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SUPREME COURT U.S.

Supreme Court of the United States

No. 55

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 55

MANUFACTURERS TRUST COMPANY, AS TRUSTEE  
UNDER AN INDENTURE MADE BY THE DEBTOR  
UNDER DATE OF SEPTEMBER 27, 1933, AND INDIVIDUALLY, PETITIONER,

vs.

REGINE BECKER, EMILY K. BECKER AND  
WALTER A. FRIBOURG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

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**IN UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT**

**In the Matter of CALTON CRESCENT, INC., Debtor**

**MANUFACTURERS TRUST COMPANY**, as Trustee under an  
Indenture made by the Debtor under date of September  
27, 1933, and individually, Objector-Appellant,

against

**REGINE BECKER, EMILY K. BECKER and WALTER A.  
FRIBOURG, Claimants-Appellees**

**Appendix to Appellant's Brief—Filed October 29, 1948**

**STATEMENT UNDER RULE 15 (b)**

This proceeding was commenced by the filing of a petition by the debtor in the United States District Court for the Southern District of New York under Chapter XI of the Bankruptcy Act on May 23, 1946.

The appellees, Walter A. Fribourg, Regine Becker and Emily K. Becker, filed their proofs of claims as creditors [fol. 2] of the debtor on October 28, 1946. The appellant, Manufacturers Trust Company, as indenture trustee and individually, filed its objections to the claims of all three of the above named appellees on December 6, 1946.

A hearing upon the said objections was had before Referee Peter B. Olney on December 30, 1946, January 2, 8 and 20, February 3, March 24, April 10 and May 21, 1947.

On July 2, 1947 the Referee filed his Memorandum of Law and Findings of Fact and Conclusions of Law, disallowing the objections to the aforesaid claims. On July 11, 1947 the Referee entered an order dismissing said objections.

On July 18, 1947 the appellant, Manufacturers Trust Company, petitioned for a review of the order of said Referee which said petition for review came on to be heard before the Hon. Henry W. Goddard, District Judge, on April 21, 1948.

On July 13, 1948, the District Court handed down an opinion affirming the determination of the Referee and on July 21, 1948 an order signed by the Hon. Henry W. Goddard, District Judge, affirming the order of the Referee dismissing said objections was filed.

The appellant's notice of appeal was filed on August 5, 1948.

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[fol. 3] IN THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK

No. 84684

In the Matter of CALTON CRESCENT, INC., Debtor

PROOF OF CLAIM OF WALTER A. FRIBOURG \*

STATE OF NEW YORK,  
County of New York, ss:

Walter A. Fribourg, of 11 West 42nd Street, in City of New York, County of New York, State of New York, being duly sworn, deposes and says:

1. That he hereinafter designates himself as claimant.
2. That Calton Crescent, Inc., the above named debtor, was at and before the filing by said debtor of the petition for arrangement, and still is justly and truly indebted (or liable) to claimant in the sum of \$55,000.00.
3. That the consideration of said debt (or liability) is as follows:

Debenture bond issued by debtor in 1933 in connection with a reorganization of debtors property known as Calton Court Apts., said bonds being numbered: D91, D4, M10, D115, M169, M8, L18, C35, C36, M67, [fol. 4] D41, M91, M90, C64, C65, L39, D98, D97, B8, M13, M14, M15, M16, D67, D12, M217, D100, D40,

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\* Similar proofs of claim were made by the other appellees, Regine Becker and Emily K. Becker, their claims being in the amount of \$44,500 and \$52,800 respectively and being based, of course, upon other debentures of the debtor.

M65, M66, D141, D112, C137, C138, L81, M72, M73, D54, M161, D71, M168, M255, M256, D113, D25, D29, D26, D23, M71, M11, D77, C16, C17, L9, D6, D5, M201, M200, M9, D3, M273, M274, M276, M277, M278, M279, M280, D120, D118, D119, D121, D122, M281, D82, D151, M42, D24, D94, D11, M49, M50, M51, D84.

and actual custody thereof being in claimant.

4. That no part of said debt (or liability) has been paid.
5. That there are no set-offs or counterclaims to said debt.
6. That claimant does not hold, and has not, nor has any person by claimant's order, or to defendant's knowledge or belief, for claimant's use, had or received, any security or securities for said debt.

Walter A. Fribourg.

(Sworn to by Water A. Fribourg, Oct. 28, 1946.)

[fol. 5] IN UNITED STATES DISTRICT COURT

OBJECTION TO CLAIM OF WALTER A. FRIBOURG \*

[Same Title]

To Honorable Peter B. Olney, Referee in Bankruptcy:

Manufacturers Trust Company, as Trustee under an Indenture made by the Debtor under date of September 27, 1933, and individually, one of the creditors of the Debtor, objects to the allowance of the claim of Walter A. Fribourg filed herein in the amount of \$54,500, upon the ground that by reason of the manner and circumstances under which the said creditor acquired the debentures of the Debtor, which are the subject matter of said claim, at prices substantially less than their real value, said claim should be limited to the aggregate of the

\* Similar objections to allowance of claims were made to the claims of Regine Becker and Emily K. Becker which were in the respective amounts of \$44,500 and \$52,800.

amounts actually paid by the said creditor for the said debentures of the Debtor.

And in respect of said objection Manufacturers Trust Company (hereinafter referred to as "Manufacturers") further alleges:

1. Manufacturers is a corporation duly organized and existing under the laws of the State of New York, and has its principal office at No. 55 Broad Street, in the Borough of Manhattan, City and State of New York.

2. Heretofore under an indenture dated February 1, 1928, by and between Empire Bond & Mortgage Corporation and the American Trust Company (thereafter merged with Bank of Manhattan Trust Company on October 30, 1930), the said Empire Bond & Mortgage Corporation issued its so-called First Mortgage 6% Participation Gold Bond Certificates in the principal amount of \$575,000 [fol. 6] secured by a first mortgage on the Calton Court Apartments, being an apartment house located in New Rochelle, Westchester County, New York.

3. Thereafter by reason of default in the payment of taxes and monthly instalments on account of principal and interest, a foreclosure proceeding was instituted by the corporate trustee of said mortgage. By reason of such foreclosure proceeding, and on or about April 25, 1932, a protective committee for the holders of said Gold Bond Certificates was organized and Manufacturers was named and acted as depositary for said committee.

4. Thereafter under date of July 1, 1933 a plan of re-organization was promulgated by said committee and in pursuance of said plan, on September 8, 1933, the said premises were sold at foreclosure and bid in by the committee for the sum of \$93,000. At the time of the sale unpaid taxes, penalties and liens, other than the lien of the mortgage, aggregated in excess of \$91,000. In payment of the amount bid upon the sale, the committee delivered to the corporate trustee \$513,600 face amount of said Gold Bond Certificates deposited with the committee.

5. In further pursuance of said plan, the Debtor herein was organized to take title to said premises.

6. It was provided by the plan that the New Company (the Debtor) would create an issue of debentures in a

principal amount aggregating 50% of the principal amount of certificates deposited or which should be deposited with the committee, such debentures to be issued in denominations of \$50, \$100, \$500 and \$1,000, to be registered as to both principal and interest, to be dated as of the date of delivery of the deed by the referee in fore-[fol. 7] closure to the New Company, and to mature twenty (20) years from the date thereof. It was further provided that said debentures should bear interest at a rate not exceeding six percent per annum as the directors in their sole discretion should declare out of the net earnings of each calendar year.

It was further provided that under the plan of reorganization each assenting depositor should receive \$50 of such debentures and one share of no par value stock of the New Company for each \$100 principal amount of the certificates of deposit, and that no debentures or stock should be issued except to such depositors.

7. Thereafter and on September 27, 1933 said premises were duly conveyed to the Debtor and said Debtor entered into an indenture with Manufacturers as Trustee, proving for the issuance of its debentures provided for in the plan. Said indenture continues in force and effect, and the Manufacturers has at all times acted and is still acting as trustee thereunder.

8. In pursuance of said plan and under the terms of said indenture there were issued and are outstanding \$254,450 principal amount of said debentures, and there remain unexchanged \$4,700 principal amount of certificates of deposit, convertible into \$2,350 principal amount of such debentures, or a total authorized of \$256,800 principal amount of debentures.

9. At the time of the issuance of the securities of the Debtor in pursuance of the plan and indenture, there were 205 holders of outstanding certificates or deposit.

10. In further pursuance of the plan, the Debtor borrowed the sum of \$175,000 from Poughkeepsie Savings [fol. 8] Bank of Poughkeepsie, New York, secured by a first mortgage on the said premises, upon which mortgage there is now due and unpaid the sum of \$154,000 principal amount.

11. In pursuance of the provisions of the plan, the first directors of the Debtor were selected by the said

committee, and said directors in turn elected its first officers. In consequence the management of the Debtor was, as contemplated by the plan, for the benefit of the holders of Mortgage Certificates of Empire Bond & Mortgage Corporation, who had elected to deposit their certificates and to participate in the plan.

12. From time to time beginning in September, 1941, debentures of the Debtor were acquired by or for the benefit of five individuals or some of them, to wit, Sanford Becker, Norman S. Becker, Walter A. Fribourg, Emily K. Becker and Regine Becker. Said Sanford Becker and Norman S. Becker are brothers, and they and said Walter A. Fribourg share the same office space and are or have been jointly interested in various business ventures, particularly matters involving real estate. Said Emily K. Becker is the wife of said Sanford Becker and said Regine Becker is the mother of said Sanford Becker. The claimant to whose claim this objection is filed is the same as the person of that name forming one of the said group.

13. The said debentures so acquired by members of said group aggregate the principal amount of \$156,800, which are nominally held as follows (including the claim here objected to) :

[fol. 9] Sanford Becker	\$ 5,000
Emily K. Becker	52,800
Regine Becker	44,500
Walter A. Fribourg	54,500

14. In April 1942 the Debtor placed a second mortgage upon the said premises in the face amount of \$15,000, the mortgagee being one Baset Realty Corporation. This mortgagee was a corporation organized at that time, for which the capital was supplied by said Beckers and Fribourg or members of their families. Thereafter, in October, 1943, the Debtor made an assignment of rents to said Baset Realty Corporation, and said corporation thereupon went into possession of the property, and collected the rents and income therefrom and continued in possession of the property until the sale thereof as hereinafter set forth.

15. In or about April 1942, and at or about the time of the making of said mortgage to said Baset Realty Cor-

poration, said Sanford Becker and Norman S. Becker became directors of the Debtor, Norman S. Becker became Secretary and Sanford Becker became Treasurer of the Debtor, and the offices of the Debtor were thereafter maintained at the offices of the said Beckers. Subsequently, in or about May 1944, said Norman S. Becker became President of the Debtor. The other officers and directors of the Debtor resigned, and the Beckers, their family and said Fribourg thereupon came into control of the Debtor.

16. During the years 1944, 1945 and 1946 the said members of the Becker family and the said Walter A. Fribourg acquired a substantial principal amount of debentures and corresponding stock of the Debtor from public holders of [fol. 10] said securities at prices ranging from approximately 3% to 14% of the par value of the debentures so acquired, and said debentures were so acquired from such public holders thereof at times when the holders of such debentures were not being supplied with fair and adequate financial information as to the affairs of the Debtor, and without disclosing to said holders (a) the identity of the purchasers thereof; (b) that such purchasers were in control of the corporation; (c) that the Baset Realty Corporation, the second mortgagee in possession, was owned and controlled by some or all of said members of the Becker family; (d) that from time to time offers were being received for said property at prices which would leave for the debenture holders an equity substantially in excess of 14% of the par value of their debentures; and (e) that it was known to such purchasers that there was imminent or had been executed a contract for the sale of the Debtor's property, which would result in cash and purchase money mortgage proceeds sufficient to leave an equity for the debenture holders of about 40% of the par value of the debentures.

17. Debentures upon which the claim here objected to was filed consist in whole or in part of debentures so purchased under the circumstances above set forth.

18. In October 1945 the Debtor made a contract for the sale of said premises, and thereafter and in pursuance of such contract said property was conveyed on January 8,

1946 to one Calton Properties, Inc. for a total sales price of \$300,000, paid as follows:

Subject to the said first mortgage to the Poughkeepsie Savings Bank in the then unpaid principal [fol. 11] balance of \$154,000; by cash of \$70,000 and by purchase money mortgage to the Debtor of \$76,000.

From the proceeds of said sale, the Debtor satisfied the second mortgage to Basset Realty Corporation and paid a brokerage commission of \$6,000, leaving cash remaining from the said proceeds of sale of approximately \$50,000.

Said sale was made without the knowledge or consent in writing or otherwise of Manufacturers.

19. Said purchase money mortgage was thereafter sold pursuant to an order of this Court for the sum of \$66,000, resulting in a total cash in the possession of the Debtor of \$118,662.17 prior to administration expenses.

20. By further order of this Court entered upon confirmation of the amended plan of arrangement herein there were directed to be paid to the general creditors, including the debenture holders of the Debtor, amounts equivalent to 43 61/100% of the principal amount of their claims.

21. To permit the creditor to whose claim this objection is filed to receive a minimum dividend of 43 61/100% upon said creditor's claim is inequitable, inasmuch as some or all of the debentures held by said creditor upon which said creditor's claim was filed were acquired by said creditor for amounts ranging from 3 to 14% of the face amount of said debentures when said creditor belonged to a group in control of the affairs of the Debtor and failed to make fair and full disclosure to the holders from whom such debentures were purchased of all of the facts and circumstances as hereinbefore set forth.

[fol. 12] Wherefore, Manufacturers Trust Company prays that said claim be disallowed except to the extent of the aggregate of the amounts actually paid by the said creditor for the debentures upon which said claim is made, and for such other and further relief as is just.

Dated: December 6, 1946.

Manufacturers Trust Company, Creditor-Objectant.  
By Frank P. Gage, Trust Officer.

Beekman & Bogue. By Edward K. Hanlon, a Partner,  
Attorneys for Creditor-Objectant, No. 15 Broad Street,  
New York 5, New York.

(Verified by Frank P. Gage, Dec. 6, 1946.)

[fol. 13] IN UNITED STATES DISTRICT COURT

**Extracts from Stenographic Minutes of the Hearing Before  
Referee Olney**

[Same Title]

**EXTRACTS FROM TESTIMONY OF SANFORD BECKER**

Page 28\*

By Mr. Hanlon:

Q. In the course of this proceeding, Mr. Becker, your brother made an affidavit, a copy of which I have here which was served on me, which was verified on June 18, 1946, and I read you the following sentence from that affidavit which you can see as I read it:

“My brother, Sanford Becker, in September, 1941 purchased in the open market five thousand of such debentures at the prices then prevailing.”

A. I believe the date is correct;

• • • • • • •

Pages 35-38

By Mr. Hanlon:

Q. Coming back to the minutes and the discussion which I just read you from those minutes of the meeting on January 30, 1942 you will notice that Mr. Fribourg made reference to a stockholders' suit!

A. That is correct.

Q. Were you a party to that suit?

A. I was the plaintiff, the only plaintiff.

\* Page references are to the paging of the Stenographer's Minutes.

Q. Where was that stockholders' suit?

A. I would not know.

Q. In which court?

A. I would not know that.

[fol. 14] Q. You do not know in which court it was, although you signed the papers?

A. I sign any papers that lawyers give me. But I do not know in which court.

(General discussion followed.)

The Referee: Go ahead.

Q. What was the status of that suit when this meeting was held on January 30, 1942?

A. The suit was for the purpose of an injunction to prevent the sale.

Q. What was the status of the suit, at what point had the suit arrived at the time of this meeting on January 30, 1942?

A. I don't know.

Q. All you remember now is that you had brought the suit?

A. That is right.

Q. What was the basis upon which you objected to the sale as set forth in the papers filed in that suit?

A. That I believed the price to be inadequate and that if it were liquidated there would be nothing for stockholders, that if the corporation were able to continue eventually they would receive more.

Q. Did you make any statement as to what you believed a fair appraisal of the property would show?

A. When I say "statement" I am referring now to the Court papers. I don't know; I may have.

Q. Didn't you make a statement in those papers that the property was worth at least what the Poughkeepsie Savings Bank had appraised it at?

A. I don't know.

Q. You have no present recollection?

A. I don't remember what the appraised figure was.

Q. But you do remember that you felt that that \$220,000 was not enough money for this property in 1942?

A. I do know at that time my opinion was that if they sold it for two hundred and twenty they would receive nothing, so the best thing they could do would be to stay in business.

[fol. 15]

Q. Didn't you make an allegation in those papers which you signed as to the value of the property, in those court papers?

A. I may have; I don't know. If you have a copy of it, I could tell you very quickly.

Q. I don't have a copy of them.

A. I don't either.

Q. Do you recollect whether in connection with that same case that you brought as a stockholder answering affidavits were furnished in respect to the injunction suit by your brother Norman and Mr. Fribourg?

Mr. Kahn: I am sorry, I did not get that question.

Mr. Hanlon: I said did he recollect that answering affidavits were furnished by his brother Norman Becker and Mr. Fribourg.

A. I don't know.

Q. And you have no copies of the papers in that case?

A. No, sir.

Q. Did you make any investigation at that time by way of getting an appraisal or otherwise as to the value of the apartment house?

A. No.

Q. You said you yourself were not a real estate man?

A. No, I am not.

Q. So I am stumbling along from that and trying to find out as to whether you made any inquiry as to that?

A. I may have; I don't remember. It is a long time ago.

Q. All you remember now is that you objected to a sale and brought suit?

A. That is right.

Q. And you stand by any statement that you made in those suit papers?

A. Naturally.

• • • • • • •

[fol. 16] Page 48

By Mr. Hanlon:

Q. Mr. Becker, you recollect that the proposal to sell this property for \$220,000 to this proposed purchaser, the Chesterbrook Estates, Ltd., finally came to a vote of the stockholders?

A. I believe so.

Mr. Hanlon: May it appear on the record, so that we will not have to put the minutes in, that this came to the attention of the stockholders at an adjourned meeting held on February 17, 1942; that the affirmative vote in favor of the sale was 3,326 shares—I beg your pardon, it was 3,083 shares, which was short of the requisite two-thirds.

Q. So that the proposal was not carried; is that correct, Mr. Becker?

A. That is correct.

• • • • •

Pages 50-52

By Mr. Hanlon:

Q. In this letter, Mr. Becker, you say this:

"Providing the necessary legal stockholders' approval is obtained, a client of mine has offered to loan to Calton Crescent, Inc. a sum necessary to clean up all of the dividends" and so forth.

When you spoke of "a client" of yours to whom were you referring?

A. I was then referring to my wife, my mother and Walter A. Fribourg.

Q. Your wife being—

A. (Interposing) Emily K. Becker.

Q. And your mother being Regine Becker?

A. That is right.

[fol. 17] Q. This offer was accepted, was it not, Mr. Becker?

A. Yes.

Q. And the execution, the delivery of the mortgage, was authorized at this annual meeting of stockholders held on February 17, 1942?

A. Yes.

Q. The loan of \$15,000 actually was made by one Baset Realty Corporation, wasn't it?

A. That is correct.

Q. What was the Baset Realty Corporation?

The Referee: What do you mean, "what was it"?

Q. (Continuing) When was it organized, Mr. Becker?

A. I don't know.

The Referee: He has admitted in the stipulation that the capital was supplied by—(interrupted by)

Mr. Kahn: That is correct.

Mr. Hanlon: I did not know he admitted it.

The Referee: I have a note of it.

Q. This was a corporation, the Baset Realty Corporation, organized by your mother, your wife and Mr. Fri-bourg in New York?

A. No.

Q. When was it organized?

A. It was organized by Mr. Eisenberg to complete this transaction.

Q. Mr. Eisenberg, your lawyer, organized the Baset Realty Corporation?

A. Yes.

Q. Who were the stockholders?

A. I don't know.

Q. Who advanced the money to the corporation to enable it to make the loan of \$15,000 to the debtor?

A. The three individuals whom I mentioned.

Q. That is, your mother—

[fol. 18] The Referee: What did they get; did they receive notes of the corporation?

The Witness: They got the mortgage.

The Referee: Who got the mortgage?

The Witness: The three individuals.

The Referee: Baset did not get the mortgage?

The Witness: No. They were merely a depository for it.

The Referee: Did Baset assign the mortgage to these three individuals?

The Witness: Yes.

Q. In other words, as I understand, the mortgage was assigned originally from Baset Realty Corporation?

A. Yes.

Q. Which in turn—(interrupted)

A. They gave participation in the mortgage to those three individuals.

The Referee: That is something else again.

The Witness: I don't know what the legal details was.

The Referee: To what extent did they give participation?

The Witness: One-third each.

By Mr. Hanlon:

Q. Was it one of the requirements for the lending of the \$15,000 by Baset or through Baset that Baset had the right to elect two directors of the debtor?

A. Yes.

The Referee: Of the debtor?

Mr. Hanlon: Yes.

[fol. 19] The Referee: That was the subject matter of a directors' meeting, of directors' action by the debtor corporation, was it?

Mr. Hanlon: It came up at such a meeting.

The Referee: That is what I wanted to find out.

The Witness: Yes, sir.

The Referee: Whether it was pursuant to action of the board of directors.

Q. Thereafter, Mr. Becker, it came to pass, on April 7, 1942, that this mortgage transaction was closed, was it not?

A. Yes.

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Pages 68-72

Mr. Hanlon: In response to my question of a moment ago Mr. Becker has indicated to me in the minutes of the annual meeting of stockholders held on February 17, 1942 the following paragraph which I will read for the record (doing so):

"Mr. Amend stated that he had conferred with Mr. Eisenberg and that Mr. Becker would be willing to loan \$15,000 on second mortgage provided he be given the right to designate a majority of the board of directors and the right to appoint the managing agent, and Mr. Becker stated that he would increase the offer of the mortgage loan in his letter to \$15,000 accordingly."

Q. Is that the statement you indicated?

The Referee: That refers to this Becker, Sanford Becker?

[fol. 20] Q. That refers to you, Mr. Becker?

A. Yes. It was in that conversation that I told him.

Q. I ask you where in the minutes it is shown?

A. That is in reference to that conversation. The minutes refer to a conversation I had with Mr. Amend and Mr. Eisenberg in which conversation I told them who the parties were that were participating in the loan.

Q. My question was directed to the meeting of the stockholders.

A. I stated it at the open meeting, too.

The Referee: You stated it at the open meeting, but it is not in the minutes of the meeting; is that what you want to say?

The Witness: Yes. There was a lot of conversation; the meeting lasted four or five hours and not one-tenth of it is in the minutes.

(Further colloquy followed.)

Q. Returning to the meeting of the directors held on April 7, 1942, during the course of which your Honor will remember this mortgage transaction was closed, the minutes correctly state, do they not, Mr. Becker, that you and your brother were elected directors at that meeting?

A. I believe it was at that meeting.

Q. Well, aren't you sure?

A. I believe it was.

The Referee: According to the statement you made at the stockholders' meeting you made it a condition of the loan that you be permitted to have a majority on the board?

The Witness: Yes.

The Referee: Who was the third one?

The Witness: We waived that afterwards; it was changed afterwards so that only two members of the board were designated.

[fol. 21] Mr. Kahn: Two members what?

The Witness: Only two members of the board were designated.

The Referee: How many members were there; five?

The Witness: There were at least five.

The Referee: Did you designate also the managing agent?

The Witness: Yes, we did.

The Referee: Who was that?

The Witness: That was the Westchester Trustees.

Q. Is that the full name?

A. Westchester Trustees.

Q. Who are they?

A. They are a co-operative agency which managed a good many of the issues in Westchester County for the courts.

Q. You have no interest in Westchester Trustees, have you?

A. None whatsoever.

Q. Nor your brother nor Mr. Fribourg?

A. None whatsoever.

Q. Returning again to this letter of April 7th when you and your brother were elected as members of the board you were so elected as the designees of Baset Realty Corporation, the second mortgagee?

A. Yes.

Q. In pursuance to your understanding?

A. Yes.

Q. At the same meeting it is stated that you were elected treasurer of the debtor and your brother secretary, is that correct?

A. If the minutes state it. I don't remember.

Q. But you did at or about that time become treasurer and your brother did become secretary of the debtor, did he not?

A. My recollection is it was some time later.

Q. I show you the minutes, and if it so states you will not dispute it, will you?

A. No, no.

[fol. 22] Mr. Hanlon: It is right at the top (indicating).

(Further colloquy followed.)

Q. Referring further to the board of directors' meeting of April 7, 1942, I read the following from Objectant's Exhibit 8:

"On motion duly made and seconded, it was unanimously resolved that the principal office of the corporation be fixed at the office of the treasurer, Room 2346, No. 11 West 42nd Street, in the Borough of Manhattan, City of New York."

You recollect the adoption of that resolution?

A. Yes.

Q. And when it speaks of "the office of the treasurer" at the room and address which is mentioned, does it refer to your office?

A. Yes.

Q. And did it thereupon ensue that the office of the debtor was transferred to your office?

A. Yes.

Q. And thereafter maintained there until the present time?

A. Yes.

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Page 74

By Mr. Hanlon:

Q. Mr. Becker, subsequently on June 28, 1944, three directors who then held office, other than your brother and yourself, resigned, did they not?

A. What date?

Q. The date that I have is June 28, 1944. The precise date is not important. Was it on or about that time?

A. I don't know the exact date.

Q. But they did—

A. (Interrupting) They did resign.

Q. Who were those three directors who resigned?

A. My recollection is they were Richard Kelly, Henry Hays and Mr. Clay; that is my recollection.

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[fol. 23] Pages 74-77

By Mr. Hanlon:

Q. Who were the directors who were elected in their place?

A. I don't know. The minutes will state. I don't remember.

Q. Well, looking at the minutes of the annual meeting on February 20, 1945, which was subsequent to the time as to which I have been questioning you, I find that they elected at that meeting yourself and your brother, Mr. Alvin Lichtenberg and Mr. Edward Hennefeld. Were those two of the directors who were elected in the previous summer when these gentlemen you mentioned resigned?

A. Yes, yes.

Q. Does that help you to recall who the fifth director was who was elected on that occasion?

A. No, I don't know who the fifth director was.

Q. Who is Mr. Lichtenberg?

A. Who is Mr. Lichtenberg?

Q. Yes.

A. Mr. Lichtenberg is a friend of mine.

Q. Is he in business with you?

A. No.

Q. Was he a stockholder of the debtor?

A. No.

Q. He was elected a director of the debtor and served at your request?

A. That is correct.

The Referee: At whose request?

Mr. Hanlon: At Mr. Becker's request.

The Referee: This witness?

Mr. Hanlon: Yes. Mr. Becker testified Mr. Lichtenberg was a friend of his.

Q. Now, who is Mr. Hennefeld?

A. He was also a friend of mine.

[fol. 24] Q. Was he a security holder of the debtor?

A. I don't believe so.

Q. And he likewise served as a director of the debtor at your request because he was a friend of yours?

A. That is right.

The Referee: What particular qualifications did they have for being directors, except being a friend of yours?

The Witness: They have no particular qualifications, except that we could not get any one else to serve; no one else would serve.

The Referee: What was the reason for that, if you know?

The Witness: Because the corporation was bankrupt, it had no assets of any kind and was heavily in debt, and no one wanted to be associated with it.

Q. You say you do not remember the name of the fifth director who was elected in June, 1944?

A. No.

Q. I find it at a later date one Ann Priskie was serving as a director?

A. Yes. She is my secretary.

Q. Was she one of the board of directors elected in June, 1944?

A. Probably, yes.

**The Referee:** At your request?

**The Witness:** At my request, yes.

**Q.** Was she a securityholder?

**A.** No.

**Q.** And did she continue to function from June, 1944 to the present time?

**A.** If the minutes so state I believe so, yes.

**The Referee:** That was the whole board, the five members? [fol. 25] **The Witness:** The five members.

**The Referee:** Your brother, yourself, Mr. Lichtenberg and this other man, and your secretary?

**The Witness:** Yes.

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By Mr. Hanlon:

**Q.** Now, on October 19, 1943 it is admitted, as I understand it, that the debtor made an assignment of rents to the Baset Realty Corporation?

**A.** Yes, sir.

**Q.** Now, what occurred after the debtor made the assignment of rents to the Baset Realty Corporation with respect to the management of the property, the collection of its income and so on?

**A.** The mortgagee in possession retained the managing agent to manage the building.

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Pages 78-79

By Mr. Hanlon:

**Q.** When did you become president of the debtor corporation?

**A.** I never became president.

**Q.** Who is the president; your brother?

**A.** My brother is, yes.

**Q.** When did he become president?

**A.** I don't remember.

**Q.** Was that at the same time the other three directors went out?

**A.** Probably.

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By Mr. Hanlon:

Q. Now, in between the offer in respect to which your suit was brought and the sale which was consummated last [fol. 26] year were any other offers made and received by the debtor corporation for the apartment property?

A. No legitimate offers.

Mr. Hanlon: Your Honor, I would ask that the answer be stricken. I asked him whether any other offers were made.

The Referee: What did he say?

Mr. Hanlon: "No legitimate offers."

Mr. Kahn: I think that is a perfectly proper answer.

The Referee: Strike the answer.

Were there any offers made at all?

The Witness: Yes, sir.

Q. What offers were made?

A. Some verbal offers were made by brokers, which were not legitimate offers.

Mr. Hanlon: Now I ask to strike that out again, your Honor.

The Referee: Strike out "which were not legitimate offers". I don't know why we have to take his characterization of the offers.

Q. What offers were received from brokers that you just referred to?

A. A broker came in and said he thought he could get \$240,000. I asked him to submit the offer in writing, and that is the last I heard of it.

Q. Who is that broker?

A. I don't even remember the names.

Q. When was it that the broker came and made that statement, approximately?

A. Oh, they came in continuously.

Q. How frequently would you say?

A. I should say once a month at least.

Q. You had brokers coming in?

A. Yes.

[fol. 27] Q. What was the range of the figures these brokers suggested that they thought they could get?

A. All about the same figures.



By Mr. Hanlon:

Q. Do you remember a lawsuit that Mr. Sanford Becker brought against the directors of the debtor and the debtor itself in which he asked for damages?

A. I heard of it.

Q. And asked for the appointment of a receiver?

A. Yes.

Q. And sought to enjoin the sale of the property which was then contemplated?

A. Yes, sir.

Q. Did you have anything to do with that lawsuit?

A. I had nothing to do with it, no, sir.

Q. You knew it was going on?

A. Yes, sir, I did.

Q. By any chance did you make an affidavit in that lawsuit?

A. I heard so, yes, sir, that I did.

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Mr. Hanlon: While the appropriate number of (shares of) stock need not necessarily be acquired with the debentures, I assume under these schedules, unless the contrary be understood in each specific case, that in case of the debentureholders shown on this schedule there was also received by the purchaser the appropriate number of (shares of) stock?

Mr. Kahn: Yes, that is correct.

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[fol. 29] EXTRACTS FROM TESTIMONY OF WALTER A. FRIBOURG

By Mr. Hanlon:

Q. When you purchased these \$7,000 principal amount of securities through Reiley & Company you were aware, were you not, that the Baset Realty mortgage had been closed; in other words, that the money had been advanced and the mortgage made?

A. In August?

Q. In July and August.

A. Oh, yes, certainly.

Q. And that Mr. Sanford Becker and Mr. Norman S. Becker had become officers and directors of the debtor?

A. Well, if they had I knew when they were. I don't know—

Q. Whenever it was, you knew that?

A. Whenever they became directors I knew that, yes, sir. I don't know when it was.

Q. And that the office of the debtor had been moved to the office of the Beckers, you knew that at that time?

A. I think so, yes.

Q. In other words, whatever the facts were at that time you were informed of them?

A. I knew about them.

Q. You knew at that time then that Mr. Sanford Becker was secretary of the corporation?

A. Well, I don't know what he was. He was an officer I think.

Q. Whatever he was?

A. Whatever he was I knew about it. I don't remember the time.

Q. You knew, Mr. Fribourg, that the minute books and records of the corporation were then at 11 West 42nd Street?

A. I did not know that, but it is logical that they would be if that was the office of the corporation.

Q. Did you at any time during this period see any financial books of the corporation?

A. No, sir.

Q. Did you at this time discuss with Mr. Norman Becker [fol. 30] or with Mr. Sanford Becker the financial affairs of the corporation?

A. Not to any extent.

Q. You did to some extent, didn't you?

A. I don't think so, not to any extent.

Q. Well, by this time—and by that I refer to August 5, 1942—you had acquired \$12,000 in principal amount of debentures and the appropriate accompanying stock?

A. That is right.

Q. With that in mind, I ask you again is it your recollection that you did not discuss the affairs of the debtor to any extent with either of the Beckers?

A. No, I don't think so; to any extent, no. I may have asked how they were getting along and they answered.

Q. Did you get any figures from them as to operations?

A. I don't think so, sir.

Q. Did you have any discussion with them as to the substitution of the Westchester Trusts as agent in place of the agent who had theretofore handled the apartment house?

A. Was it at that time—

Q. Yes.

A. (Continuing) That the change was made?

Q. Yes.

A. Then I knew about that.

Q. You discussed that with them?

A. I did not discuss that with them. They said they were going to do that—they thought that was the right people to handle it.

Q. Which one of them said it?

A. One or the other; I can't remember that sir.

Q. You can't remember that because you did have at various times conversations with one or the other with respect to the debtor?

A. That is right.

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[fol. 31] Pages 129-133

By Mr. Hanlon:

Q. The schedule shows further than on May the 25th, 1944 you purchased \$8,250 in principal amount of these securities from Richard Kelly for \$247.50.

Mr. Richard Kelly was a president of the debtor, was he not?

A. That is right.

Q. Do you remember the circumstances in connection with that purchase?

A. Well, they were sent in to the Corn Exchange Bank.

Q. Did you yourself discuss the proposition with Mr. Kelly?

A. No, sir.

Q. You had no talk with him whatsoever?

A. No, sir.

Q. You say they were sent in to the Corn Exchange Bank. For whose account?

A. Our account.

Q. Who is "our"?

A. That was—it was in the name of Winter, Charles Winter.

The Referee: It was in the name of who?

The Witness: Charles Winter.

Q. Charles Winter is a brother-in-law of yours; is that right?

A. That is correct.

Q. And he was your brother-in-law at that time?

A. Yes.

Q. What is the business of Charles Winter?

A. Charles Winter, he had real estate and at that time he was with Julius Grossman; but he had outside interests, I think. I don't know exactly what it was, but he was interested in some real estate; I really don't know what. I know he had stocks. I think he was a rich man. His mother was wealthy before him.

Q. When you spoke of "our account" at the Corn Exchange, was it the account of yourself and Mr. Winter?

A. No; it was in Mr. Winter's name.

Q. Whose money was it?

A. It was my money.

Q. Was it all your money?

A. Yes, sir.

Q. Until Mr. Kelly's debentures and stock were received and paid for at the Corn Exchange Bank did you know that Mr. Kelly proposed or contemplated selling them?

A. Yes, I am sure—(interrupted)

Q. In what way did that knowledge come to you?

A. I think Mr. Becker told me.

Q. Which Mr. Becker?

A. Either one, I think; I don't know which.

Q. What was it Mr. Becker told you?

A. Well, he told me that Mr. Kelly—now let me see—, Mr. Kelly was willing to sell his bonds, he wanted to sell his bonds because he was, as I think of it now, he was disgusted with the situation; and I said, I think I said, "Well, listen here. I will gamble if I buy mine".

Q. It was before or after the account was opened at the Corn Exchange Bank?

A. I think that was before.

Q. How long before would you say?

A. I can't remember, sir.

Q. Now let me show you—

The Referee: When was this; 1944?

Mr. Hanlon: In '44, your Honor, yes.

Q. (Continuing) Let me show you a copy of a letter addressed to Calton Crescent, Inc. by Charles Winter, dated May 2, 1944, and ask you if you have any recollection of that letter?

A. Well, if this is the offer, yes. We made an offer.

Q. There is no question about that being a copy?

A. I imagine that is right.

[fol. 33] Q. You recollect that document?

A. I remember the letter that was sent out or sent to him.

The Referee: Who?

The Witness: From Mr. Winter to Mr. Kelly, is it? Or, to the Calton Crescent.

Q. It is addressed to the Calton Crescent, Inc.

A. That is right. That is the letter, sure.

Just let me look at it again to make sure. (After perusing same) Yes, that was an offer made.

Q. And you knew at that time that the offer was being made?

A. That is right, yes.

Mr. Hanlon: I offer that in evidence, your Honor.

The Referee: Is there any objection?

Mr. Kahn: No.

(The same was received in evidence and marked, "Objectant's Exhibit 14" of this date.)

Q. Before Mr. Winter wrote this letter which has been marked Objectant's Exhibit 14 I suppose he discussed it with you?

A. Yes.

Q. It refers in the letter, for example, to the fact that the Corn Exchange Bank Trust Company, Grand Central branch, will honor sight drafts. I assume that before this letter was sent you had arranged for the bank account to which you referred a moment ago?

A. Well, I don't know whether it was before; but it was done so if anything came in it was taken care of.

Q. In other words, you furnished Mr. Winter with the funds to pick up any securities?

A. That is right.

Q. (Continuing) Which might be received in response to this letter?

A. That is correct.

[fol. 34] Q. And those funds were deposited in the Grand Central branch of the Corn Exchange Bank?

A. That is right.

Q. Did you have anything to do with the composition of this letter?

A. I think I did. I will have to see it. I think I did.

Q. Can you tell me to which parts of the letter you contributed?

A. I don't know. My interest is I will purchase.

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Pages 135-140

By Mr. Hanlon:

Q. Prior to the writing of this letter by Mr. Winter and yourself, signed by Mr. Winter, did you consult with either of or discuss this with either of the Beckers?

A. I think so.

Q. Well, now, just try to remember which one you talked about it to?

A. Well, that I wouldn't—I can't tell.

Just a supposition: the thought I have in my mind is that I think I talked it over with Sanford. I am not sure, though.

Q. You may have talked it over with both of them; is that correct?

A. I don't think so; I think I talked it over with Sanford.

Q. What discussion did you have with Sanford?

A. Well, to my best recollection I think that he said, "Would you be interested to buy at a low price, because there isn't much there and it does not look so good", or something like that; and I said, "Well, I will gamble".

I think he told me that Mr. Kelly was kind of disgusted with the situation and he wanted to get out, and he would sell his stock—whatever he had—, bonds; and would I

[fol. 35] be interested in it? I said, "Well, I would be interested in a price, at a price".

Q. Is that all there was to the discussion?

A. I think so, yes.

Q. Was there a price discussed?

A. Yes, I think it was.

Q. And what was said about that?

A. I don't remember, I can't remember. I know some—it finally came out at three. But I don't remember what it was.

Q. At what point was the three percent or the price of three as you put it, reached?

A. How was it reached?

Q. Where, at what point; shortly before this letter was written or some days?

A. Oh, it must have been before that letter.

Q. I say shortly before.

A. That I would not know.

Q. That was reached in one of your discussions to the best of your recollection with Sanford Becker?

A. With respect to my recollection that would be Sanford.

Q. Who suggested that you not only purchase Mr. Kelly's eight thousand five hundred principal amount but also make a proposition, as you did, through Winter to purchase from other securityholders; who made that suggestion?

A. I would not know that, sir. I may have made it myself. I said if I was going to gamble I might just as well gamble— It was not a tremendous outlay of money.

Q. Would you say that Mr. Sanford Becker did not make that suggestion?

The Referee: The figure you mean?

Mr. Hanlon: No; from purchasing from others than Richard Kelly.

A. I don't know. I may have made that.

Q. To Mr. Becker?

A. Yes.

[fol. 36] Q. And that was the subject of discussion?

A. I don't know what you mean by "discussion".

Q. I mean you and Mr. Becker talked that over?

A. I think so.

Q. Did Mr. Becker say anything about taking that suggestion up with Mr. Kelly?

A. I think he did.

Q. What did he say?

A. You mean what did Mr. Kelly—

Q. No. What did Mr. Becker say?

A. To me?

Q. You and Mr. Becker discussing—

A. I think he said he would take it up with Mr. Kelly somewhere or other.

Q. Was the suggestion made during the course of these talks between you and Mr. Sanford Becker that it would be helpful if Mr. Kelly wrote a letter to the securityholders?

A. I have no idea.

Q. You know a letter was written?

A. By Mr. Kelly?

Q. Yes.

A. Yes, sir, I subsequently knew that.

Q. Is it your testimony, Mr. Fribourg, that you did not know that Mr. Kelly proposed or that it was proposed that Mr. Kelly write a letter?

A. Oh, no.

Q. To accompany Mr. Winter's letter?

A. I knew that.

Q. In addition of the fact?

A. I knew that he was—I think I said to Mr. Sanford Becker, "well, listen here. If Mr. Kelly wants to sell at that price, maybe others will" and I think that is how it came about.

Q. Well, then, you having said that, can you recollect any conversation with respect to Mr. Kelly co-operating with you or at least writing a letter to accompany Mr. Winter's letter?

A. I think the only time I saw—the only time I remember is when I saw the letters going out.

Q. Did you discuss with Mr. Kelly the writing of such a letter?

A. Did I discuss that?

Q. Yes, with anybody?

A. Well, I think Mr. Winter said he was going to write a letter or would write a letter.

[fol. 37] Q. Did you know that Mr. Kelly was going to write a letter to accompany Mr. Winter's letter?

A. I think so, yes.

Q. I show you this copy of a letter of Mr. Kelly, addressed to the stockholders of Calton Crescent, Inc., dated May 13, 1944, and ask you if you did not know that that letter was sent out?

A. Oh, yes.

I would have gotten one, anyway.

Q. And if you did not know in advance that it was going to be sent out?

A. I think I knew in advance that it was going to be sent out.

Q. And didn't you see the text of that letter in advance that it was going to be sent out?

A. That I would not be able to say, sir.

Q. Would you say that you did not?

A. Let me read it, please.

Now, I can't—I don't know whether I saw that letter or not. I thought he was going to write a letter, but whether I saw the text of this letter, I don't know whether I did, sir.

Mr. Hanlon: May I first offer that letter in evidence.

Mr. Kahn: No objection.

The Witness: I don't think I saw that letter before I got it.

(The same is received in evidence and marked, "Objectant's Exhibit 15" of this date.)

Mr. Kahn: What is the date of that letter?

Mr. Hanlon: May 13, 1944.

The Witness: This is 1944?

Mr. Hanlon: Yes.

(Colloquy off the record followed.)

Mr. Kahn: All right, you go ahead.

[fol. 38] Q. Do you know whether Mr. Winter's letter, which has been marked as Exhibit 14, was sent out in printed or mimeographed form? I have just shown you a typewritten copy.

A. Yes.

Q. Do you recollect whether the letter that was actually sent out went out in typewritten, printed or mimeographed form?

A. I can't remember.

Q. Do you remember who paid for the preparation of the letter, that is, its transcription in the form in which it was sent out, either printed, mimeographed or typewritten?

A. I am trying to think because I remember Mr. Kelly saying that there wasn't any money there. I don't know, I don't know who did it.

Q. Do you think that possibly the debtor paid for it?

A. I don't know, sir.

Q. You would not say that the debtor did not pay for it?

Mr. Kahn: I object to that—a double negative.

A. I don't know.

The Referee: Objection sustained.

Mr. Kahn: Wait a minute.

Q. Who conducted the conversation with Mr. Winter with respect to the mechanics of carrying this thing out, that is, the mailing of the letters to the securityholders?

A. Who did that?

Q. Yes.

A. Well, I did part of it and I guess he did. I think he did most of it or Mr. Winter may have done it with Mr. Becker.

Q. Mr. Sanford Becker?

A. Yes.

[fol. 39] Pages 141-144

By Mr. Hanlon:

Q. Can you tell me by looking at Exhibit 11 how many securities or what securities were purchased through Mr. Winter's offer?

The Referee: Through his office?

Mr. Hanlon: Through his offer.

The Referee: This last offer you are talking about?

Mr. Hanlon: Yes, sir.

A. Do you want that all together in addition?

Q. Can you tell me the names, can you tell me which ones they were?

A. Yes.

Q. You indicate the point and I will read them into the record.

A. This one here.

Q. Indicating?

A. Twamley.

Q. Then you go down with that and tell me where it ends.

A. One, two, three, four, five—Richard Kelly I know about. You mean all that were purchased through that?

Q. Yes, purchased through Winter.

A. One, two—Well, I don't consider that Kelly purchased through Winter because he was acquiring, don't you know, and that was part of it. All right. One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve.

Q. You have indicated the following. I will give just the names of the purchasers for the record.

A. Do you want me—

Q. No; I will read it (doing so): James F. Twamley; the next, Joseph F. Boshart; Millard Shonyo; St. Lawrence [fol. 40] Co. Trust; the next, Ricketson; the next is Gerson.

Any more?

A. Hugo—

Q. (Continuing to read:) Hugo Dresvach; the next is Mrs. Assunta Briani; then Frank D. Richardson; the next Foster—

A. No; those are two houses, stock brokerage houses.

Q. (Continuing:) Henry Nieland and Margaret Mahony; the next Miss Carolyn Louise Pierce; and, finally, Frank J. Sagendorph.

In listing these names, Mr. Fribourg, you have omitted Richard Kelly!

A. Yes. He was a director.

Q. Were his bonds actually deposited with the Corn Exchange Bank?

A. Yes. But we could have bought them directly.

Q. You also omitted the name of Affeld?

A. Yes. But I could have bought them directly.

Q. But they were deposited?

A. It was a convenient way of doing—

Q. Mr. Kelly knew that you were the purchaser of these bonds, did he not?

A. Well, I think he knew it was for Mr. Winter. Whether he knew it was I or not, I don't know.

Q. What is the basis for that?

A. I don't know.

Q. I mean what is the basis of your thinking that he did?

A. Well, I think he surmised that I did.

Q. You really don't know?

A. No, I don't know.

Q. On July 12, 1944 you purchased eight thousand eight hundred of these debentures from William Henry Hays. Was that purchased through Winter?

A. He was a director.

Q. Was that acquired through Winter?

A. Yes, surely.

Mr. Kahn: What do you mean, "through Winter"?

[fol. 41] The Witness: Through the Corn Exchange.

Q. Through the Winter offer?

A. No, no.

(General colloquy followed.)

Q. What is your distinction between the Corn Exchange and the Winter offer?

A. The Winter offer came into the bank because of the Winter offer. But Mr. Kelly, Mr. Affeld and Mr. Hays, I could have bought them direct from him or bought them direct from them, you understand; but for convenience sake he sent the securities to the Corn Exchange Bank and they were paid for through that.

Q. Had you any discussions with Mr. Kelly, Mr. Affeld and Mr. Hays with respect to the purchase of that?

A. No. I think Mr. Becker took care of that.

Q. Mr. Sanford Becker?

A. I think it was Mr. Norman Becker on that.

Q. You had no direct conversation with either of these three gentlemen?

A. No, sir, I did not.

\* \* \* \* \*

Pages 164-166

By Mr. Kahn:

Q. Were you told, Mr. Fribourg, as you now remember, in September, 1943 when Baset advanced an additional sum of \$3,615.54 to pay the taxes due to the City of New Rochelle upon this Calton property whether the property was earning enough money to pay operating expenses, interest on the mortgages and taxes?

A. Yes, sir.

Mr. Hanlon: I object to the form of that question.  
The Referee: He may answer.

[fol. 42] Q. (Continuing) Were you told that?

A. Yes, sir.

Q. By whom?

A. By Mr. Becker.

The Referee: Which one?

The Witness: Mr. Norman Becker.

Q. Were you also then asked to make a contribution toward the sum of \$3,615.54 required to meet the tax payment due to the City of New Rochelle?

A. Yes.

The Referee: Who asked you?

The Witness: I think it was—well, when it came to the money part I think Mr. Norman Becker told me.

The Referee: Mr. Norman who?

The Witness: Mr. Norman Becker told me that they weren't going to be able to pay their taxes, and I think it was Mr. Sanford Becker who told me the amount and I would have to give them the money.

The Referee: It was Mr. Sanford Becker who asked you to make a contribution?

The Witness: That is right.

Q. Now, in April of 1944, Mr. Fribourg, do you recall any conversations either with Norman or Sanford Becker concerning the advance of an additional amount to pay taxes to the City of New Rochelle?

A. Yes. It was the same thing. I think we had to pay two or three or four times; I don't remember.

Q. Now, do you recall the amount that you were told that had to be paid for taxes in that month of April, 1944?

A. I am trying to think. I don't know whether it was three thousand they had to get together or two thousand. I had to give my share of it.

[fol. 43] Q. Does it refresh your recollection if I told you the amount was \$2,305.09?

A. Yes. I told you it was between two and three thousand dollars.

Q. Did you agree to put up your portion of that amount?

A. I did.

The Referee: What was your portion?

The Witness: One-third.

The Referee: And did you put up one-third on the prior  
me in September?

The Witness: Yes, sir.

• • • • • • •  
ages 166-169

By Mr. Kahn:

Q. Coming over to the year 1944, Mr. Fribourg, getting  
own to the month of April, 1944, do you recall any further  
scussion at that time with either of the Beckers regarding  
still further advance by Baset in order to meet a tax pay-  
ent to New Rochelle?

A. Yes, sir.

Q. Do you recall the amount of that?

A. I think it was around the same amount. I can't re-  
member exactly.

The Referee: Which amount; the same amount as in  
April or in the previous September?

The Witness: I think it was around the same as the  
previous September, around \$2,000.

Q. Does it refresh your recollection if I told you the  
ount advanced in 1944 was \$2,000?

A. That is what it was then.

Q. Did you put up your third on that?

A. I did.

Q. Now, at the end of October, 1944 on the basis of  
our testimony here today there had been advanced by  
Baset in addition to the \$15,000 on that mortgage the sum  
[Vol. 44] of \$7,921.63 for taxes to the City of New Rochelle?

A. Yes, sir.

Q. Are you able to state when that money was repaid?

The Referee: To Baset?

Mr. Kahn: To Baset.

A. When it was? I think it was in 1945, the latter part  
'45 I think or the beginning of '45. I think it was;  
can't remember. I would have to look it up. Maybe  
you can refresh my memory. It was in 1945 some time.

Q. Now, Mr. Fribourg, does it refresh your recollection  
I told you that that money was repaid, together with

the \$15,000 advance on the mortgage, only when the property was sold in 1946, in January 1946.

The Referee: Not in January, 1946, was it?

Mr. Kahn: Yes, sir.

The Referee: This Calton Crescent property was sold?

Mr. Kahn: In January, 1946.

The Referee: It was the mortgage we sold the other day?

Mr. Kahn: That is right.

The Referee: That is right, excuse me.

A. I don't know. It seems to me as though some of the taxes were paid first. Now, I can't remember offhand; I think the taxes were paid first.

Q. I think you are correct in that, Mr. Fribourg.

A. That is my recollection.

Q. The mortgage was repaid in January, 1946; but the taxes advanced amounted to \$7921.63, according to the information which I have here, and was repaid in installments beginning in September, 1944 and running down [fol. 45] through September, 1945.

A. Well, that is better; I think that is the situation, sir.

Q. That is correct.

But do you recall that the first payment that was received by Baset on these advances for taxes of \$7921.63 came in September, 1944 when \$1,000 was paid back to Baset?

A. I guess that is right.

Mr. Kahn: March, '45.

Mr. Hanlon: Why don't you just read into the record the fact?

(Further colloquy followed.)

The Witness: The only thing is I do remember that we received the taxes before we ever received the mortgage.

Mr. Kahn: The first payment is December, 1944 of \$1,000; March '45, \$3,000; April, 1945, \$500; May, 1945, \$500; August, 1945, \$1,500; September, 1945, \$1,421.63.

The Referee: Well, now, Mr. Hanlon, will you concede that the record did not so show?

Mr. Hanlon: I will concede that Mr. Kahn's statement is received in evidence on that, subject to any verification.

Mr. Kahn: Let us have Mr. Becker testify.

The Referee: Subject to correction.

Mr. Hanlon: Yes, subject to correction.

Mr. Kahn: Mr. Becker is going into this thing in much fuller detail.

**The Referee:** All right. Go ahead.

Q. Now, do you know, Mr. Fribourg, whether between the time that the Baset mortgage was placed on the property in 1942 and this date in September of 1945 when there was repaid finally the additional advances for taxes [fol. 46] of \$7921.63 Baset had received any interest on its second mortgage?

A. No, sir, it did not. Whether it received any interest on its second mortgage.

Q. Yes.

A. No, it did not, sir.

Page 178

By Mr. Hanlon:

Q. Now, according to your testimony in response to Mr. Kahn's questions, in September of 1943 you were called upon by the Beckers to contribute one-third of the then due taxes amounting to some \$3600. Do you recollect so testifying?

A. That is right.

Q. And your third therefore would have been \$1200?

A. That is right.

Page 182

By Mr. Hanlon:

Q. Now, it came about, from your testimony by Mr. Kahn, that you were called upon to advance about one-third for further tax payments. Do you remember that?

A. Yes, sir.

Q. And that you did advance one-third of \$2300 or something over \$700?

A. Yes.

Q. Had you at that time received any payment of the one-third which you had advanced.

A. No, sir.

Q. Wait a minute. (Continuing) Which you had advanced the prior September?

A. No, sir.

Q. Yet you gave this further advance?

A. That is right.

Q. And in October, 1944 you were called upon to advance one-third or approximately one-third of \$2,000?

A. That is right.

\* \* \* \* \*

Pages 184-185

By Mr. Hanlon:

Q. When you talked to Mr. Winter about buying these certificates of Calton you had already advanced the first third of this tax money?

A. That is right.

Q. In the previous September?

A. No part of that had been paid, no.

Q. By May of 1944?

A. Yes, I think that is correct—yes, that is correct.

Q. And in April of 1944 you were called upon to advance the second third of tax moneys?

A. That is correct.

Q. Do you remember discussing that with Mr. Norman Becker or Mr. Sanford Becker in connection with the proposed Winter letter?

A. No, sir.

Q. Those two things had no mutual relation, is that your testimony?

A. That is correct.

Q. You further testified in response to questions of Mr. Kahn that Mr. Winter said he would go along with you in purchasing the bonds. Do you recollect that?

A. That is right.

Q. And as I recollect your testimony, the idea was that he would go fifty-fifty?

A. That was my supposition, my thought at that time, that we would go fifty-fifty.

Q. But he bought no bonds?

A. That is correct.

Q. No securities?

A. That is correct.

Q. Isn't it correct that he also put up no money in the Corn Exchange Bank?

A. That is right.

Q. It was all your money?

A. That is right.

Q. From the beginning?

A. That is right.

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[fol. 48] EXTRACTS FROM TESTIMONY OF SANFORD BECKER

Pages 206-208

By Mr. Hanlon:

Q. What about Mr. Fribourg, what were the circumstances in connection with his agreeing to come in on the loan?

A. When he heard me make the offer at the meeting about obtaining the loan he said, "You can count me in on it".

Q. Did he specify the amount of his contribution?

A. No, not at that time.

Q. So it was after you had talked to your wife and your mother, that Fribourg had made the comment that you just referred to, that you arrived at the \$15,000 figure split three ways; is that correct?

A. No; the fifteen thousand was arrived at the meeting.

Q. Then you determined, I assume you yourself determined, it should be split three ways?

A. It was based upon the fact that he wanted a participation and I had some \$10,000 of my wife's and my mother's money.

Q. But I mean you determined on the three-way distribution of the loan, did you not, among them?

A. Yes.

Q. It appears from Mr. Fribourg's testimony that in September of 1943 there was advanced by Mr. Fribourg, your mother and sister—

A. My mother and my wife.

Q. I beg your pardon. (Continuing) Your mother and your wife, each one a third, the sum of \$3,616.54?

Mr. Kahn: What is the date of that?

Mr. Hanlon: In September of 1943.

Q. (Continuing) The taxes due the City of New Rochelle. Do you recollect that?

A. That is correct.

Q. Who handled the participations of your wife and mother in that?

A. I did.

[fol. 49] Q. Did you talk to them about it?

A. Yes.

Q. When and where?

A. In my home.

Q. What did you say and what did they say as nearly as you can remember?

A. I told them that they would need some more money for the taxes and they told me, "Have you any money of mine?"; I said, "Yes"; they said, "Go ahead and put it up".

Q. That is the whole conversation?

A. The whole conversation.

Q. Had either of these ladies ever inspected the property after their first advance for the mortgage of the Baset Realty, I mean interiorly inspected it?

A. They were never in the interior of the property.

Q. Have they ever throughout the intervening years acquainted themselves with any of the figures or statements of the company?

A. No, none.

Q. They acted entirely as a result of their conversation with you?

A. The fact that they had a mortgage as security.

Q. I mean, Mr. Becker, they had no other information, except what was derived from you?

A. I don't know what information you mean.

Q. Information as to the business of the building, its financial affairs, its tenancy?

A. None whatsoever.

Q. In April of 1944 there was advanced for taxes due the City of New Rochelle an additional amount of \$2,305.09. That appears also from Mr. Fribourg's testimony that you, rather, your wife and your mother each advanced one-third of that. Were the circumstances the same?

A. The same.

Q. Were the circumstances the same in connection with the third advance made in October, 1944 of \$2,000?

A. Yes.

[fol. 50] EXTRACTS FROM TESTIMONY OF E. HENRY SONDEIMER

Page 211

By Mr. Hanlon:

Q. Did you have any familiarity with a corporation known as Calton Crescent, Inc., which is the debtor in this proceeding, prior to 1944?

A. No, sir.

Q. When did you first hear of that company?

A. Oh, around the end of '43, the beginning of '44 I would say.

Q. From whom did you first hear of that company?

A. From Mr. Fribourg.

Q. What was it Mr. Fribourg told you about it?

A. He was interested in it.

Q. Interested?

A. In buying bonds of the issue.

Q. Are you quite sure that Mr. Fribourg spoke to you before either of the Beckers?

A. I am almost positive, sir.

Q. Well, what is the first transaction which you had in the securities of Calton Crescent, Inc.?

A. February, 1944 (referring to paper).

\* \* \* \* \*

Page 229

By Mr. Hanlon:

Q. Mr. Sondheimer, you have testified to a group of transactions now with Mr. Fribourg. May I ask you did you have an understanding or open order of some sort from Mr. Fribourg with respect to these purchases?

A. No, sir.

Q. What was the procedure adopted?

A. Well, I know the man had a continuing interest in it, and every time I got an offer I showed it to him and if he wanted it he took it.

Q. As far as you know these were all being purchased [fol. 51] for Mr. Fribourg's account?

A. My confirmation records show that.

Q. That is all you know about it?

A. That is all I know.

Q. Were these purchased for Fribourg's own account?

A. All I know is what my records show.

Q. Did you sell any Calton Crescent bonds to any one else besides Mr. Fribourg?

A. No, sir.

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The Referee: Did you ever have any dealings with a lady named Emily K. Becker?

The Witness: No, sir.

The Referee: Did you ever have any dealings with a lady named Reginé Becker?

The Witness: No, sir.

The Referee: I mean did you have either of those ladies as customers of yours?

The Witness: I know what you mean.

The Referee: Did you purchase any securities for them?

The Witness: No, sir.

Pages 233-235

By Mr. Hanlon:

Q. You spoke a little while ago of some communication or communications that you sent to securityholders. Have you a copy of that?

A. I have various copies that I sent over the year.

Q. Did you send any circular letter?

A. Yes.

[fol. 52] Q. First of all, do you have a copy of such circular letter or circular letters?

A. I have some copies.

I know on this one letter in '44 the girl just typed up one copy; we did not bother making continued office memorandums.

I have a letter in April, 1946; there is a circular letter which I sent out.

Q. May I have that, please?

Mr. Hanlon: The witness has handed me a letter dated April 8, 1946.

Q. This mimeographed letter, Mr. Sondheimer, just what does that represent; the sheet or letter which you sent from time to time?

A. Yes.

Q. There may have been some slight variations, but similarly—

A. (Interrupting:) Substantially the same.

Q. Do you have another letter of the same date?

A. I have a badly mutilated postal card. I don't know; it was probably back in '44 or '45.

Q. First of all I would ask—You have handed me a postal card. You say you think that was sent out to various holders of Calton Crescent securities in 1944 or '45?

A. I don't know just when it was sent out.

Q. But it was sent out some time prior to April, 1946, which is the date of the letter?

A. Yes.

Q. Have you copies of any letters that were sent?

A. Yes.

Q. Have you any idea what date they were sent out?

A. On the mimeographed letters, from the answers as they were received from time to time.

Q. What would you give me as the approximate date when these mimeographed letters were sent out, of which you show me this as a sample?

[fol. 53] Mr. Kahn: I have not seen those yet.

Mr. Hanlon: I have not offered them.

A. They are in substantially the same form as I have given you there. The exact dates I can't—June, '45, there is a card somebody returned to me.

I can't tell you exactly when I sent them out.

Q. Let me ask you this to simplify it: Would you say from time to time after February 10, 1944 until some time in 1946 you sent out circular letters or cards?

A. Yes.

Q. With respect to—

A. (Interrupting:) Yes.

Q. (Continuing:) Soliciting transactions in Calton Crescent?

A. Yes, sure.

Q. In other words, you were endeavoring to purchase securities of Calton Crescent?

A. I don't remember—yes.

Pages 236-237

By Mr. Hanlon:

Q. Did you send any of these circulars to which we have been referring, the letters or the postcards, at the suggestion or request of Mr. Fribourg?

A. No.

Q. How did you get—from whom did you get the names and addresses of the persons to whom these circular letters or postcards were sent?

A. From Mr. Fribourg.

Q. Did he send you that as a list—

A. Yes.

Q. Do you have that list with you?

A. It is on a form here.

(Colloquy off the record followed.)

Mr. Hanlon: Mr. Sondheimer has handed me, your Honor, this list which is in three pieces of paper.

[fol. 54] Q. One question before I offer it in evidence: There are certain markings on this list, lines drawn through names and other notations?

A. Those were all office notations.

Q. Those were put on after you got the list?

A. Yes.

Q. So when you got the list it was barren?

A. Barren of those notations and markings. When we use a list it does get marked up.

Q. Did you get all of these three pieces of paper at the same time?

A. Gee, I would not know.

Q. But you do know that you got them from Mr. Fribourg?

A. Yes.

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EXTRACTS FROM TESTIMONY OF SANFORD BECKER

Pages 249-250

By Mr. Hanlon:

Q. Did you consult with your mother or your wife, as the case may be, with respect to these Sondheimer purchases?

A. Oh, yes.

Q. From time to time?

A. Yes.

Q. Each time?

A. Not each time.

Q. When did you have your first discussion, having reference to the purchases which are indicated on Exhibits 12 and 13?

A. I could not fix the date.

Q. Approximately when, Mr. Becker?

A. I couldn't fix the date. I see my wife every day and I see my mother most every day.

Q. Would it be fair, summing up your testimony, to say from time to time you saw them—from time to time when you saw them you mentioned these Calton Crescent securities?

A. Yes.

[fol. 55]. Q. Did you give them any accounting of what you were buying?

A. No. They never asked for any account.

Q. You bought and charged them for their accounts?

A. Yes.

EXTRACTS FROM TESTIMONY OF MYLES B. AMEND

Pages 259-260

By Mr. Hanlon:

Q. Did Mr. Norman Becker or Mr. Sanford Becker make any statement to the stockholders at a meeting.—

## The Referee: Which stockholders?

Q. (Continuing:) The stockholders of the debtor, Calton Crescent, Inc., at the meeting of February 17, 1942, at which meeting there was discussion with respect to the identity of the persons who were advancing the money to Baset Realty Corporation to make the loan?

A. I don't think they did.

Q. Have you any recollection that they did?

A. No, I haven't.

46  
Pages 260-263

By Mr. Hanlon:

Q. Mr. Amend, the statement was made by Mr. Sanford Becker in his testimony—

The Referee: Which page is that?

Mr. Hanlon: Page 67 of the minutes.

Q. (Continuing:) And I read you with respect to this subject matter and ask you this question:

[fol. 56] "Q. I ask you this, Mr. Becker: Is there any written communication from you to the debtor or to the officers of the debtor in which you stated the names of the persons who were actually advancing this money, that is, your wife, your mother and Mr. Fribourg?"

"A. I don't know if there is anything in writing; but all of the directors—"

"Q. I only asked you that one question: Was there anything in writing?

"A. I don't know. There should be."

"Q. I quite agree. Do you know of any communication to the stockholders of like tenor giving them that information?

"A. I stated it at the meeting.

"Q. At which meeting; the meeting of the stockholders?

"A. A meeting of the stockholders."

and then skip a question (continuing to read)

"Q. Mr. Becker, I assume you are referring to the minutes of the stockholders' meeting, the annual meeting held on February 17, 1942, and I am directing your attention to one of the later pages to help you. Will you look through those and show me where you informed the meeting of the identity of the persons who were putting up the money?"

and in answer to that question the minutes show that Mr. Becker indicated the following paragraph from those minutes:

"Mr. Amend stated that he had conferred with Mr. Eisenberg (that is at the top of page 69 of the minutes) and that Mr. Becker would be willing to loan \$15,000 on second mortgage provided he be given the right to [fol. 57] designate a majority of the board of directors and the right to appoint the managing agent, and Mr. Becker stated that he would increase the offer of the mortgage loan in his letter to \$15,000 accordingly."

"Q. Is that the statement you indicated?"

and the answer was "Yes"; and then I went on (continuing to read):

"I ask you where in the minutes it is shown?"

"A. That is in reference to that conversation. The minutes refer to a conversation I had with Mr. Amend and Mr. Eisenberg in which conversation I told them who the parties were that were participating in the loan."

Now I ask you, Mr. Amend, to state whether in words or substance Mr. Sanford Becker made any statement to you with respect to the persons who were participating in the loan?

A. No. I don't think he did.

Q. You have no recollection of such a statement?

A. No, none whatever.

The Referee: Would you swear he didn't?

The Witness: No. It is five years ago, your Honor. But my best recollection is that he did not.

Q. I show you now, Mr. Amend—

Interrupting myself: Did any one else to the best of your recollection make any statement to you at or about this time, that is, February, March or April, 1942, with respect to the identity of the person or persons who were advancing the money to Baset Realty Corporation to make this loan?

A. Not to the best of my recollection, no.

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[fol. 58] EXTRACTS FROM TESTIMONY OF CHARLES G. WINTER  
Pages 315-318

By Mr. Hanlon:

Q. Did you have any familiarity with an apartment house in New Rochelle known as Calton Crescent?

A. I had nothing to do with it.

The Referee: What?

The Witness: Nothing.

Mr. Hanlon: Will you please keep your voice up.

Q. Had you ever seen that apartment house?

A. Never.

Q. Do you know anything about its affairs at all?

A. No, nothing.

The Referee: What is the name of the apartment house?

Mr. Hanlon: Calton Apartments.

Q. Mr. Winter, I show you what pnports to be a copy of a letter signed "Charles G. Winter", addressed to Calton Crescent, Inc., dated May 2, 1944, being Objectant's Exhibit No. 14 in this proceeding; and ask you if you remember that letter or the letter of which that is a copy?

A. I don't remember the letter.

Q. Do you remember having any conversation with Mr. Fribourg with respect to sending a letter of this type?

A. No.

Q. Did you have any conversations with Mr. Fribourg with respect to making an offer for purchasing securities?

A. No.

Q. Of Calton Crescent, Inc.?

A. No.

Q. Did you have a bank account at the Corn Exchange Bank, Grand Central branch, at any time in your name?

A. Yes.

Q. Do you still have that account?

A. No.

[fol. 59] Q. How long did that account exist?

A. Very shortly.

Q. Whose money was in that account?

A. Mr. Norman Becker took me to the bank and introduced me to some manager or whoever it was, and he put the money in the bank.

Q. "He" being who?

A. Mr. Norman Becker put the money in the bank.

Q. No part of that money was yours?

A. No.

Q. You were about to say something else. What was it?

A. And that is how the account was opened I wanted to say.

Q. Did you ever make any deposits in that account yourself?

A. No, sir.

Q. Did you ever make any withdrawals from that account?

A. Only the checks that were made out that I signed.

Q. What checks were those?

A. Whatever they made out for the bondholders or whatever it was; I don't know what it was.

(General colloquy ensued.)

Q. What was the purpose of this bank account so far as you knew?

A. Well, as I remember it, I mean Norman Becker came to me and talked to me about opening an account. It was like an accommodation, that is the way he put it to me; so I just went with him to open the account.

Q. Did you have any conversation with Mr. Norman Becker as to what he was going to use the account for?

A. That they were buying some bonds or something like that. I found out later that they were buying bonds and stuff like that.

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[fol. 60] Page 318

By Mr. Hanlon:

Q. You say you drew checks on that account?

A. Yes.

Q. Or, rather, signed checks?

A. Yes.

Q. Do you have those canceled checks?

A. I gave them to Norman Becker.

Q. When did you give them to him?

A. When I got them from the bank.

Q. Do you have any bank statements covering the account?

A. When I got them, when I got the bank statements, I gave them to Norman Becker.

Q. So that you have no bank records with respect to this account at all?

A. Nothing at all.

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EXTRACTS FROM TESTIMONY OF MR. NORMAN S. BECKER

Pages 346-350

By Mr. Hanlon:

Q. After the Baset Realty loan was made you became a director and officer of the debtor. Did you continue to interest yourself in finding prospective purchasers for the property? I am referring, of course, to the apartment house.

A. At that time, yes.

Q. Did you receive any offers or inquiries from others with respect to the purchase of the property?

A. I received inquiries asking for figures about the building, but no offers.

Q. Would you be able to estimate the frequency with which those inquiries were received?

A. Well, different brokers would call up and ask for different figures.

Q. What sort of figures?

A. They would want to know what the operating charges [fol. 61] were, what the rents were, what the mortgages were, and what was due on conditional bills of sale, and the amount of taxes.

Q. How frequently were those inquiries received, if you can estimate?

A. It is hard to estimate.

Q. With a fair degree of frequency?

A. I would say ever so often and then a broker would hear about it from somebody else and ask for the figures.

Q. He contacted you?

A. He contacted me or Mr. Kelly, or Mr. Kelly asked him to contact me.

Q. These inquiries in one fashion or another were handled by you?

A. Mr. Kelly in most of the times referred them to me.

Q. So that ultimately you handled them?

A. Ultimately I had to give them the figures.

Q. Now, did you get any offers after April, 1942 as distinguished from inquiries?

A. No.

Q. No offers whatever?

A. Not then, no.

Q. From that time on project yourself right to the time that the property was sold. Will you tell me what offers, if any, were received?

A. I think the first semblance of an offer was from a fellow by the name of Rubin.

Q. Do you remember how much that offer was?

A. It purported to be about \$250,000, if I remember.

Q. Tell me why are you putting it that way, saying "it purported to be"?

A. From the type of broker who made the offer. I personally had no confidence in it whatsoever.

Q. Was that offer made on account of—at least purportedly on account of—one Solomon Solomon?

A. I think the name sounds familiar, because I tried to check him up to find out who he was and could not get any information from anybody.

[fol. 62] Q. This Rubin was a broker?

A. He was a broker.

Q. And he purported to bring in an offer of \$250,000?

A. Yes. I never met the man though.

Q. When was it that the purported offer was made?

A. I can't tell you offhand.

Q. You recollect that Rubin brought a suit, don't you?

A. Yes, yes.

Q. He claimed in that suit to have brought about this offer in November, 1944. Would you say that is correct?

A. If he says so, I suppose it is. I mean I would not have any independent recollection of just when it was.

Q. Do you know anything about an offer by one Tannenbaum for the purchase of this property?

A. Who was he; a broker, a principal, or what? I don't know him at all.

Q. Do you recall any offer in the neighborhood of \$280,000 in 1945?

A. I don't know anybody by the name of Tannenbaum at all. I know a real estate broker by the name of Jerome Tannenbaum; he handles loft buildings.

Q. Forget the name of Tannenbaum; the name may be in error.

Do you recall an offer for this property in the sum of \$280,000 in 1945.

A. In the fall of 1945 I think there was somebody that made an offer of that price, a broker.

Q. Two hundred and eighty thousand?

A. About, yes.

Q. Do you remember on whose behalf that offer was made?

A. No, I don't.

Q. The principal was not disclosed?

A. No. It was something in the nature of an inquiry.

Q. What was done about that on the part of the debtor?

A. Well, at that time—I think my recollection would be that they decided that they should, in view of the market, try to get \$300,000 for the property.

[fol. 63] Q. Was that the inquiry or offer or whatever it have been, for \$280,000?

A. It was an inquiry; it never crystalized into an offer.

Q. But it was turned down, in any event?

A. The inquiry was turned down. It was made in the form of an inquiry, "Would you take \$280,000?"

Q. And the debtor answered No in substance?

A. Yes. I think I was the party that said the stock-holders would have to vote on any proposition that would have to be made so I would not be in a position to tell him any price; it would be a question of submitting a firm offer with a deposit and then submitting it to the stock-holders.

Q. Did you say anything to the broker in question about getting a minimum offer of \$300,000?

A. I told him that I thought \$300,000 should be the price, yes.

\* \* \* \* \*

Pages 352-355

By Mr. Hanlon:

Q. Do you know Mr. Charles G. Winter who was on the stand this afternoon don't you?

A. Yes.

Q. How long have you known Mr. Winter?

A. Oh, I imagine about four or five years.

Q. I show you this letter, a copy of a letter which I showed Mr. Winter—

The Referee: Which one is that?

Mr. Hanlon: Objectant's Exhibit 14, your Honor, being the letter signed by Winter, addressed to the debtor.

Q. (Continuing) I ask you if you are familiar with that? I am not referring to that particular copy; I am referring to the letter.

[fol. 64] Mr. Kahn: Is that the one with the offer?

Mr. Hanlon: Yes.

A. Yes.

Q. When did you have any information with respect to such an offer?

A. When I saw the draft of the letter which Mr. Kelly prepared.

The Referee: That letter?

The Witness: Of this letter. Mr. Kelly prepared that letter.

Mr. Hanlon: That is referring, your Honor, to this letter from Winter to the debtor.

The Referee: Yes, Exhibit 14.

Q. When was it that you first saw the draft of the letter? It is dated May 2, 1944, if that will help you.

A. Oh, I imagine it was about a week before that.

Q. Did you have any conversation with Mr. Kelly?

A. Oh, yes.

Q. Where was this conversation?

A. In Mr. Kelly's office.

Q. Where was his office?

A. 233 Broadway, in the Woolworth Building.

Q. You came down at Mr. Kelly's request?

A. Oh, yes.

Q. Did you know at that time what you were coming down for?

A. I used to come down to his office regularly.

Q. So on this particular occasion he called you down?

A. He called me down there.

Q. And he showed you what turned out to be this particular letter, Objectant's Exhibit 14?

A. Yes.

Q. What conversation did you have with Mr. Kelly with respect to this?

A. Mr. Kelly said he prepared a letter of an offer which was to go out and he wanted to prepare an accompanying letter with it because he felt that the time to get out of [fol. 65] Calton as far as he was concerned was the present time, and that he was not interested in selling his stock unless all of the stockholders were offered the same proposition that was being submitted by this letter here; and he said that he personally would be very happy if every stockholder would do it and would get out and would be able to wind up the whole Calton thing and make a finish of it.

Q. Let me ask you this before you go any further with the conversation: Had you heard anything about a proposal to buy the debentures and stock at three per cent of the par value of the bonds?

A. Yes.

Q. Prior to the time that you went down to Mr. Kelly's office?

A. He spoke to me about it when he was up at the annual meeting.

• • • • • • •

Page 356

By Mr. Hanlon:

Q. Did you have more than one conversation then with Mr. Kelly with respect to the subject matter of selling or making an offer to the securityholders between those two dates?

A. I may have. I would not have any independent recollection now of whether I did or not; I mean I used to see him so often it is just possible when I did see him it was discussed.

Q. During this intervening period did you have any discussion with Mr. Fribourg on this same subject.

A. I think so—I think so. As a matter of fact, I think Mr. Kelly had some discussion at the annual meeting with Mr. Fribourg. It was at one of the meetings.

Q. Did you hear the discussion?

A. Yes, naturally. I was there.

• • • • • • •

[fol. 66] Page 358

By Mr. Hanlon:

Q. Did you have any conversation with Mr. Winter?

A. Did I?

Q. Yes.

A. Yes. I used to go to lunch with him once in a while. Of course I had conversations with him.

Q. My question was directed to the subject matter of these securities. Did you have any discussions with him?

A. In a very limited way. Most of Mr. Winter's instructions are done only through one person and that is Mr. Eisenberg.

Mr. Hanlon: I move to strike that out.

The Referee: Strike it out.

Did you have any discussion with Mr. Winter with respect to this matter?

The Witness: Very limited.

The Referee: What did he say?

The Witness: Winter said he was going to make an offer for some of the securities of the Calton and that he was going to work it out with Walter.

The Referee: Walter who?

The Witness: Walter Fribourg; and he just wanted to let me know about it, that is all.

• • • • • • •

Pages 359-362

By Mr. Hanlon:

Q. Do you know whose money it was?

A. It was Fribourg's bank, so I imagine it was from Fribourg.

Q. Were you told by Fribourg whether or not he put any money in that account?

A. In an offhand way I was given to understand that it was.

[fol. 67] Q. That it was Fribourg's money?

A. Yes.

Q. Now, did you receive from Mr. Winter at any time canceled checks on that account?

A. I might have received one or two months from him and to give to Mr. Fribourg, that he came in to go to lunch

with Fribourg and Fribourg was not there; and he might have handed me a statement as he handed me lots of times papers and say, "Give these to Walter".

Q. Would you say that he did in that case hand you the canceled checks?

A. Maybe he did.

Q. You would not be in a position to say that he did not do so; he may or may not have?

A. He may or may not have.

Q. We were talking a while back about a conversation with Mr. Kelly at his office at 233 Broadway on the day he showed you the draft of the Winter letter, Objectant's Exhibit 14. Will you go on with that conversation? You started to tell me what happened and I interrupted you to go back—

A. Well, I mean I can tell you what the gist of it is.

Q. That is all I want.

A. As I remember, the gist of the conversation was he thought it was a good idea to make the offer as he wanted all of the securityholders to have it. He did not want to sell unless the same offer was made to every securityholder; he even went farther and said, "If Winter wants to buy, we have no money. Winter will have to pay to have these letters mimeographed and sent out". But I thought it would be perfectly proper that we send the letters out for him.

The Referee: Who is this; Kelly?

The Witness: Yes.

[fol. 68] Q. Then Kelly showed you this draft letter?

A. Yes.

Q. You will notice it begins with a statement—it being signed by Charles G. Winter—. "I will purchase the six per cent bonds of Calton Crescent, Inc." and so on?

A. Yes.

Q. I particularly direct your attention to the pronouns "I will purchase".

A. Yes.

Q. Did you in connection with that conversation with Mr. Kelly say that Mr. Winter is not the buyer?

A. I don't recall that.

Q. Did you have any conversation with Mr. Kelly which would indicate that Winter was not the buyer?

A. I knew Winter was mixed up with Fribourg; that I did know.

Q. Didn't you know at this time that Fribourg was the one that was doing the buying?

A. I did not have any definite knowledge. I knew they were brother-in-laws and very friendly and both mixed up with Eisenberg; I knew if one made the offer the other must be interested in it. I know that I assumed that at some time Fribourg was interested in the offer.

Q. All you knew was that Winter was the name that was being used?

A. That is right.

Q. And when you were down there to talk to Mr. Kelly at that time did he also show you the draft of the letter which he proposed to send out to the stockholders over his name, being Objectant's Exhibit 15?

A. I believe he did. I would not have any independent knowledge right now. I believe he did, although it is some days later I notice on the date.

[fol. 69] Page 363

By Mr. Hanlon:

Q. Mr. Sondheimer testified that he sent out circular communications on several occasions to securityholders of the debtor, and in response to my request he handed me these three pieces of paper as the list of names which he had for that purpose. I am referring to Objectant's Exhibit 23. Did you ever see that list or those lists?

A. Yes, sure.

Q. Did you prepare those?

A. No.

Q. Do you know by whom they were prepared?

A. By the high quality of the typing on here it looks like Fribourg.

Q. Can you identify those as having been prepared in your office; I mean the suite at 11 West 42nd Street?

A. No, there is no way of identifying this group. I know I did not prepare it. I saw this on Fribourg's desk, but I did not prepare this.

Q. I did not hear you.

A. I saw this on Fribourg's desk, but I did not prepare this.

Pages 419-420.

By Mr. Kahn:

Q. Now apparently, Mr. Becker, according to this Exhibit No. 17, the lowest amount of indebtedness that the debtor corporation ever ended up with in any one of the months for 1944 or '45 was in the month of November, 1945 when the outstanding indebtedness stood at \$12,892.85?

A. Whatever the chart shows. The figures are correct.  
[fol. 70] Q. Yes?

A. I don't remember. I mean whatever is down there is taken from the records.

• • • • • • • • • • • •  
Pages 424-425

By Mr. Kahn:

Q. Mr. Becker, did Baset ever collect a dollar of interest on any of these advances that were made for taxes?

A. It wanted to, but it never did; it never got a penny interest on any advance made and some were as much as two years, they never got a penny interest on any advances made.

Q. Not even at the final closing?

A. Not even at the final closing.

Q. Mr. Becker, was Calton Crescent ever—

The Referee: How did you satisfy this Baset mortgage without paying up the interest?

The Witness: The interest was paid up at the time it was satisfied.

The Referee: I thought you said there was never any interest—(interrupted by)

The Witness: Interest on advances.

Mr. Kahn: I think you misunderstood me. This was not on the mortgage indebtedness.

The Referee: They did not get interest on the amount of taxes that were paid?

Mr. Kahn: Never, not a penny.

The Referee: At no time?

Mr. Kahn: Never (further discussion following).

Q. Am I correct, Mr. Becker, in my reading of this schedule that you handed me that Baset received no in-

[fol. 71] terest on the mortgage? You have already told us that it received no interest on the tax advances, but it received no interest on the mortgage until January, 1946.

A. That is right, yes, sir.

• • • • •  
Page 426

By Mr. Kahn:

Q. Mr. Becker, I show you an original letter addressed to Sanford Becker by Mr. Kelly on the stationery of Calton Crescent, Inc., dated May 22, 1944, and ask you if that is an original letter that came from the files of the debtor and whether you recognize Mr. Kelly's signature?

A. Yes, it is.

Q. Will you look at the lead pencil letter attached to that and tell me whose handwriting that is in?

A. That is Mr. Kelly.

Q. His personal handwriting?

A. Yes.

Q. Is that the draft of the letter that Mr. Kelly got up for Mr. Winter to send out?

A. Yes, it is.

Mr. Hanlon: When you speak of the Winter letter you are talking about—(interrupted by)

Mr. Kahn: There is only one Winter letter.

Mr. Hanlon: I know, Exhibit 14, Objectant's Exhibit 14.

Mr. Kahn: Yes.

Pages 428-429

By Mr. Hanlon:

Q. Now, Objectant's Exhibit 30 is as I have just stated: the report to stockholders, including income statement and balance sheet for the year ended December 31, 1942.

[fol. 72] Do you have similar sheets for the years thereafter ending December 31, 1943, '4 and '5?

A. No, I have not.

Q. Is this the last balance sheet?

A. This is the last balance sheet because we had no money to give to an auditor making it up.

Mr. Hanlon: When I speak of "this", your Honor, I mean the balance sheet as of December 31, 1942.

The Referee: Yes.

Q. Perhaps we can cover it in this manner, Mr. Becker: This balance sheet for 1942 shows a capital deficit of \$23,026.31?

A. Yes.

Q. In other words, the liabilities are greater than the amount of assets; is that correct?

A. That is what it looks like.

Q. Would you say that a balance sheet prepared for any one of the following years, that is 1943, '44, '45, would have shown any improvement in that situation?

A. No. I would rather say it would have showed up much worse.

Q. You were quite familiar with the affairs of the debtor and it is your opinion that the capital stock deficit would have been larger?

A. I imagine so.

(There ensued further informal discussion.)

Mr. Hanlon: Would this suffice for your purpose, in view of the testimony here concerning the additional losses after 1942: that it would appear to be obvious that to the extent of these additional losses, they would be reflected in any balance sheet by increasing the capital stock deficit?

Mr. Kahn: We will assume for this proceeding that to be the fact.

[fol. 73]

### Exhibits

#### OBJECTOR'S EXHIBIT 7

Copy

11 West 42nd Street,  
February 17, 1942.

Calton Crescent, Inc., 420 Lexington Ave., New York City.

DEAR SIRS:

Providing the necessary legal stockholders approval is obtained a client of mine has offered to loan to Calton

Crescent, Inc., a sum necessary to clear up all the defaults in taxes interest and amortization now due on the first mortgage held by the Poughkeepsie Savings Bank. Said sum to be secured by a bond and mortgage on all the property and assets of the corporation, subject to the reduced first mortgage now on the premises.

The offer is made on the following conditions:

1. Acceptance with 30 days.
2. Term three years from date of closing.
3. Interest at the rate of 4½% payable quarterly.
4. Form of bond and mortgage, the usual corporate resolutions, stockholders' consent and certificate of consent shall be in the forms for second mortgages subject to approval of Title Guarantee and Trust Company and counsel for lender.
5. Calton Crescent Inc. to pay all costs such as, examination of title, title insurance, survey, mortgage tax, revenue stamps recording fees and attorneys' fees.
- [fol. 74] 6. That the corporation secure written consent of the Poughkeepsie Savings Bank to withhold foreclosure for a reasonable time so that the loan can be closed and defaults made good.
7. That the proposed lender name a licensed real estate broker as managing agent at an expense to the corporation of not more than 3% and that no change can be made without the written consent of the lender.
8. That any and all stockholders be permitted to participate in this loan if they so desire.

Yours very truly, (Signed) Sanford Becker.

[fol. 75]

## OBJECTOR'S EXHIBIT 11

## Walter A. Fribourg Account

11/ 8/41	\$2,000.00	Goldwater & Co.....	\$230.00
3/28/42	3,000.00	Goldwater & Co.....	250.00
7/31/42	5,000.00	Reiley & Co.....	237.50
8/ 5/42	2,000.00	Reiley & Co.....	95.00
5/12/43	1,500.00	Shaskan & Co.....	105.00
5/22/44	2,000.00	James F. Twamley.....	60.00
5/25/44	1,000.00	Josephine F. Bochart.....	30.00
5/25/44	500.00	Millar D. Shonyo.....	15.00
5/25/44	2,000.00	St. Lawrence Co. Trust.....	60.00
5/25/44	1,500.00	Ricketson.....	45.00
5/25/44	8,250.00	Richard Kelly.....	247.50
6/ 6/44	4,000.00	Afeld.....	120.00
6/21/44	4,000.00	Gerson.....	120.00
6/ 1/44	250.00	Hugo Dresvach.....	7.50
6/22/44	500.00	Mrs. Aasunta Riani.....	15.00
6/20/44	250.00	Frank D. Richardson.....	7.50
8/16/44	500.00	Foster & Adams.....	15.00
8/29/44	500.00	Kissel Kinticutt & Co.....	15.00
6/22/44	2,250.00	Henry Nieland & Margaret M. Mahony.....	67.50
6/30/44	500.00	Miss Caroline Louise Pierce.....	45.00
7/12/44	8,500.00	William Henry Hays.....	318.75
8/16/44	1,000.00	Frank J. Sagendorph.....	30.00
4/16/45	500.00	Sondheimer & Co.....	35.00
6/13/45	1,000.00	Sondheimer & Co.....	107.50
6/22/45	500.00	Sondheimer & Co.....	55.00
10/30/45	500.00	Sondheimer & Co.....	55.00
1/29/46	500.00	Sondheimer & Co.....	55.00
4/ 3/46	500.00	Sondheimer & Co.....	60.00
6/ 4/46	500.00	Sondheimer & Co.....	131.05

[fol. 76]

## OBJECTOR'S EXHIBIT 12

## Regine Becker Account

2/10/44	\$2,500.00	E. Henry Sondheimer Co.....	\$168.75
2/21/44	5,000.00	E. Henry Sondheimer Co.....	337.50
4/17/44	3,500.00	E. Henry Sondheimer Co.....	240.63
4/26/44	4,500.00	E. Henry Sondheimer Co.....	258.75
4/20/44	15,000.00	E. Henry Sondheimer Co.....	1,068.75
4/25/44	2,500.00	E. Henry Sondheimer Co.....	143.75
4/24/44	5,000.00	E. Henry Sondheimer Co.....	275.00
5/ 9/44	3,000.00	E. Henry Sondheimer Co.....	150.00
5/ 5/44	1,000.00	E. Henry Sondheimer Co.....	55.00
8/30/45	2,500.00	E. Henry Sondheimer Co.....	362.50

\$44,500.00

## OBJECTOR'S EXHIBIT 13

## Emily K. Becker Account

5/24/44	\$2,500.00	Sondheimer & Co.....	\$137.50
6/ 8/44	2,500.00	Sondheimer & Co.....	100.00
11/14/44	250.00	Sondheimer & Co.....	10.00
6/21/45	2,500.00	Sondheimer & Co.....	262.50
11/16/44	37,500.00	Reynolds Richards & McCutcheon.....	3,750.00
2/ 5/45	7,550.00	Clay—YWCA.....	750.00

\$52,800.00

[fol. 77]

## OBJECTOR'S EXHIBIT 14

50 Park Avenue,  
May 2, 1944.

Calton Crescent, Inc., 11 West 42nd Street, New York 18,  
N. Y.

GENTLEMEN:

I will purchase the 6% debenture bonds of Calton Crescent, Inc. together with the corresponding shares of its capital stock, in units of one share of stock with each \$50--of bonds, for a unit price of 3% of the par value of the bonds. This offer is subject to termination without notice.

Bonds and stock certificates must each be accompanied by separate instruments of transfer duly executed in blank with the signature guaranteed by a bank or trust company having an office or correspondent in New York City or by a brokerage firm having membership in the New York Stock Exchange or clearing house of the New York Curb Exchange. If such instruments of transfer are executed by a corporation, or by an administrator, executor, trustee, guardian, attorney or other fiduciary, proper evidence of authority must be furnished.

If payment is to be made to a party other than the registered owner of the securities presented, proper instruments of assignment from such registered owner to the party to whom payment is to be made must be presented, accompanied by all documents necessary to effectuate such assignment, and payment of all transfer taxes upon such assignment.

The Corn Exchange Bank Trust Company, Grand Central Branch, 1 East 42nd Street, New York City, will honor sight [fol. 78] draft drawn on me when accompanied by proper documents, with the necessary bond and stock transfer tax stamps attached. If no tax stamps are attached please instruct Corn Exchange Bank Trust Company to allow deduction for necessary stamps at the rate of 21¢ on each \$100—bond.

Yours very truly, (Signed) Charles G. Winter.

## OBJECTOR'S EXHIBIT 15

Calton Crescent, Inc.

11 West 42nd Street

New York 17, N. Y.

Richard Kelly, President, 233 Broadway.

Wm. Henry Hays, Vice President, 71 Broadway.

Sanford Becker, Treasurer.

Norman S. Becker, Secretary.

May 13th, 1944.

To the Stockholders of Calton Crescent, Inc.:

An offer of Mr. Charles Winter, copy of which is enclosed herewith, is submitted for your careful consideration and prompt action if acceptable.

The report of our treasurer, filed with the Manufacturers Trust Company as trustee of the indenture under which our debentures are issued, shows receipts during 1943 of \$57,169.52, and disbursements during 1943 of \$63,586.77. This report may be examined at the office of the trustee, 55 Broad Street, New York City, or a copy thereof may [fol. 79] be examined at our office. These figures include the receipts and disbursements of Baset Realty Corp. as second mortgagee in possession since September 30, 1943. For the first four months of 1944 the receipts of the mortgagee in possession are reported to us as \$19,890.50 and its disbursements \$20,962.23. The disbursements include payment of \$3,500 on account of the principal of the first mortgage in 1943 and \$875 in 1944, and payment on account of refrigerators and other rehabilitation.

We have never, in any year, earned enough to pay both for necessary repairs and rehabilitation and the amortization due on the first mortgage, and we have, of course, never been able to set aside any funds as a reserve for depreciation. I expect to accept Mr. Winter's offer, as to the securities I own.

(Signed) Richard Kelly, President.

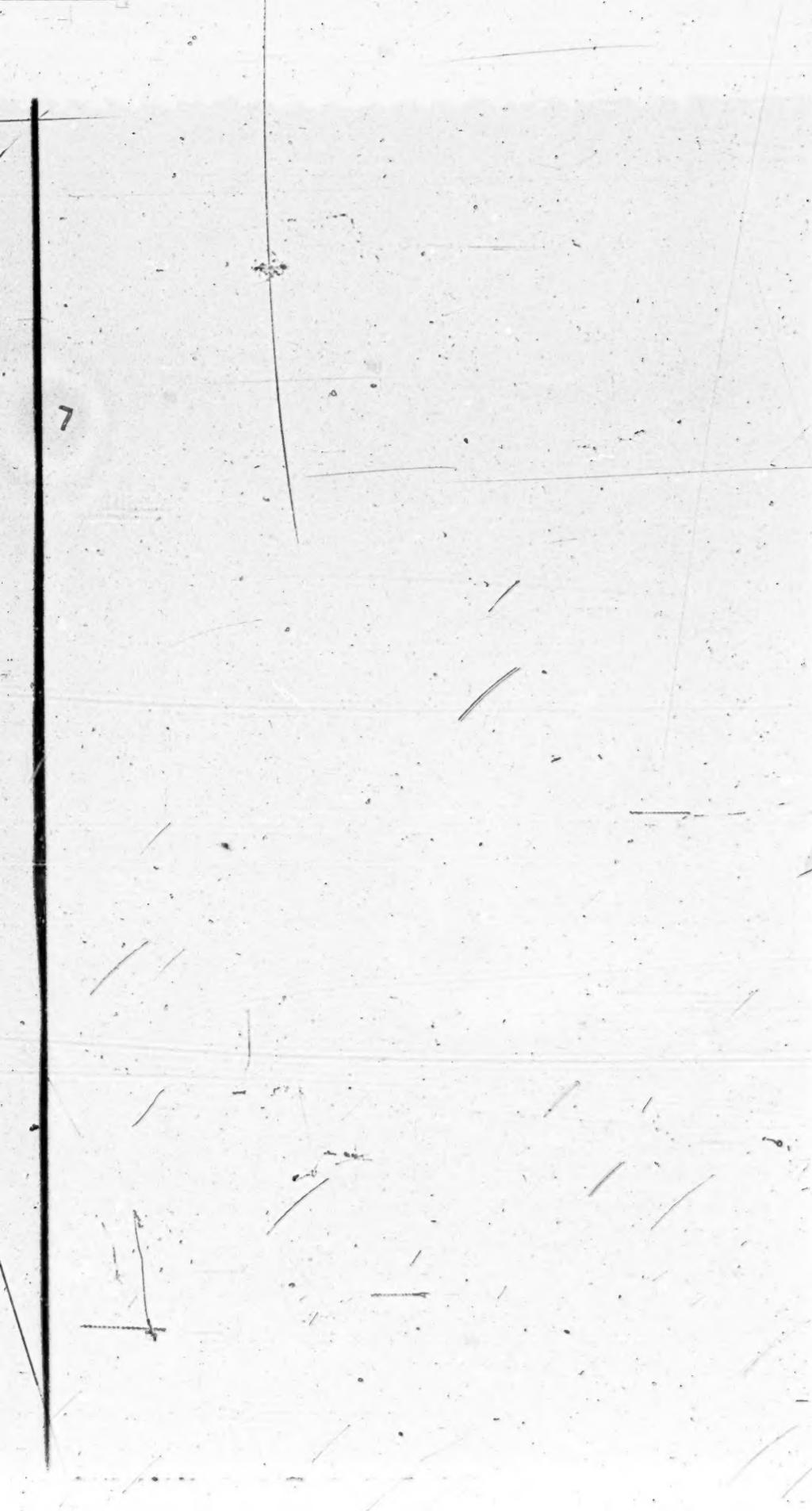
[fol. 80]

**OBJECTOR'S EXHIBIT 20**

**Ledger Sheets of E. Henry Sondheimer & Co.**  
**Account of Walter Fribourg**

**(See Opposite)** ~~20~~

(Here follow 2 Photolithographs, side folios 81, 81a)



Udoector's Edition No. 561

Walter H. Young 304 Lakes Ave. Utica, N.Y.

Aug. 18, 1920

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| 442  | 443  | 444  | 445  | 446  | 447  | 448  | 449  | 450  | 451  | 452  | 453  |
| 454  | 455  | 456  | 457  | 458  | 459  | 460  | 461  | 462  | 463  | 464  | 465  |
| 466  | 467  | 468  | 469  | 470  | 471  | 472  | 473  | 474  | 475  | 476  | 477  |
| 478  | 479  | 480  | 481  | 482  | 483  | 484  | 485  | 486  | 487  | 488  | 489  |
| 490  | 491  | 492  | 493  | 494  | 495  | 496  | 497  | 498  | 499  | 500  | 501  |

Hector Frébourg

304 Cedar Ave. Pittsburg, Pa.

[fol. 82]

## OBJECTOR'S EXHIBIT 21

E. Henry Sondheimer Co.

Investment Securities

331 Madison Avenue

New York 17, N. Y.

Murray Hill 2-3055,

TWX NY1-1215,

April 8, 1946.

DEAR:

We have an order to buy Calton Crescent 6% bonds with stock.

You are the registered holder of \$ bonds and shares of stock, according to our records, and we can pay you \$ for your holdings, less Federal and New York State transfer tax stamps.

As this order is for a limited quantity, will you please reply as soon as possible.

Very truly yours, E. Henry Sondheimer Co.

EHS:SS.

[fol. 83]

## OBJECTOR'S EXHIBIT 22

Postal Card

E. Henry Sondheimer Co.

Investment Securities

331 Madison Avenue

New York 17, N. Y.

Murray Hill 2-3055

We understand that you are the holder of \$ Calton Crescent Income Debenture 6% Due 1953 with share of stock. We are in a position to purchase your holdings for \$. If this is of interest to you, please communicate with us for confirmation.

Very truly yours, E. Henry Sondheimer Co.

[fol. 84]

## RESPONDENTS' EXHIBIT 17

Chart prepared by Mr. Norman Becker showing rents collected and expenses and other charges of Calton Crescent, Inc., on a monthly basis for the years 1944 and 1945.

(See Opposite) ~~Exhibit 17~~

(Here follows 1 Photolithograph, side folio 85)

1947	Monthly Rent Collected	Taxes and Land & Rent	Current Bal. Due Bill Payable	Interest Due Bank	Conditional Bill & Bal Refrigerator	Old Account Repayable	Insurance Lor Payable to Bank
Jan	467550	361654	1019239	750.	128899	177711	741264
Feb	505550	361654	1035844	750.	129974	177711	233349
March	516050	361654	1088299	750.	132049	177711	225434
April	4999 -	592163	950157	93750	121174	177711	217519
May	4757 -	592163	846404	93750	115199	177711	209684
June	5168 -	592163	1058979	93750	169324	177711	201689
July	5418 -	592163	1158020	1125 -	163849	177711	144477
Aug	4693 -	592163	937679	1125 -	157424	177711	136562
Sept	4973 -	592163	1002087	1125 -	161499	177711	128647
Oct	5005 -	792163	1025546	135450	175574	177711	120732
Nov	5242 -	792163	1073796	135250	139649	177711	112817
Dec	5368	692163	955241	131250	133724	177711	104902
Jan	5213 -	692163	1041679	1500 -	177299	177711	96987
Feb	5473 -	692163	727257	1500 -	116874	177711	89072
March	5133 -	392163	975711	1500 -	110949	197711	81157
April	5036 -	342163	957895	168750	1058124	177711	73242
May	5148 -	292163	733326	168750	99089	177711	65327
June	5343 -	292163	820043	168750	93274	177711	57412
July	5118 -	~92163	1112020	1835 -	87249	177711	
Aug	5198 -	142163	906408	1835 -	81324	177711	
Sept	4693 -	-	947407	1835 -	75399	177711	
Oct	5516 -		1019949	206256	69474	177711	
Nov	5027 -		841775	206250	63549	177711	
Dec	5133 -		726379	206250	57624	177711	

Gas Rate 1942 3 6 2 ave 375.500 150.31.75  
 Tax Rate 1943 3.79 ave 348.300 141.30.30  
 1944 4.12 ave 310.00 14.21.48  
 1945 4.12 ave 270.100 12.20.12  
 1946 4.12 ave 230.00 12.18.00

Accts	Conditional Rec'd	Old Accts Rec'd	Insurance Payable	Label
250.	1088.99	1777.11	441.264	20737.67
250.	1929.74	1777.11	233.349	20765.32
250.	1976.49	1777.11	225.434	21151.47
3750	1811.74	1777.11	2125.19	22124.21
3750	1151.99	1777.11	2096.84	20948.31
3750	1692.74	1777.11	2016.89	22933.66
45.-	1633.49	1777.11	1444.77	23482.20
45.-	1574.24	1777.11	1365.62	21140.39
45.-	1514.99	1777.11	1286.47	21645.72
3950	1155.74	1777.11	1207.32	24429.26
3950	1396.49	1777.11	1128.17	24273.86
3950	1337.24	1777.11	1049.02	21949.91
50.-	1222.99	1777.11	969.87	22813.39
50.-	1168.74	1777.11	896.72	19536.77
50.-	1109.49	1977.11	811.57	18876.91
6750	1050.24	1777.11	732.42	18244.85
6750	990.99	1777.11	653.27	15363.76
6750	931.74	1777.11	574.12	16092.53
65.-	872.49	1777.11		18564.43
65.-	813.24	1777.11		14951.14
65.-	753.99	1777.11		13880.17
6750	694.74	1777.11		14733.64
6750	635.49	1777.11		1389.285
6750	576.24	1777.11		15779.64

[fol. 86] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF REFEREE  
PETER B. OLNEY

[Same Title]

I, Peter B. Olney, the Referee in charge of the above entitled matter; do hereby make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Manufacturers Trust Company (hereinafter referred to as "Manufacturers") is a corporation duly organized and existing under the laws of the State of New York, and has its principal office at No. 55 Broad Street, in the Borough of Manhattan, City and State of New York.

2. Heretofore under an indenture dated February 1, 1927, by and between Empire Bond & Mortgage Corporation and the American Trust Company (thereafter merged with Bank of Manhattan Trust Company on October 30, 1930), the said Empire Bond & Mortgage Corporation issued its so-called First Mortgage 6% Participation Gold Bond Certificates in the principal amount of \$575,000 secured by a first mortgage on the Calton Court Apartments, being an apartment house located in New Rochelle, Westchester County, New York.

3. Thereafter by reason of default in the payment of taxes and monthly instalments on account of principal and interest, a foreclosure proceeding was instituted by the corporate trustee of said mortgage. By reason of such foreclosure proceedings, and on or about April 25, 1932, a protective committee for the holders of said Gold Bond Certificates was organized and Manufacturers was named and acted as depositary for said committee.

[fol. 87] 4. Thereafter under date of July 1, 1933 a plan of reorganization was promulgated by said committee and in pursuance of said plan, on September 8, 1933, the said premises were sold at foreclosure and bid in by the committee for the sum of \$93,000. At the time of the sale unpaid taxes, penalties and liens, other than the lien of the mortgage, aggregated in excess of \$91,000. In payment of the amount bid upon the sale, the committee de-

livered to the corporate trustee \$513,600 face amount of said Gold Bond Certificates deposited with the committee.

5. In further pursuance of said plan, the Debtor herein was organized to take title to said premises.

6. It was provided by the plan that the new company (the Debtor) would create an issue of debentures in a principal amount aggregating 50% of the principal amount of certificates deposited or which should be deposited with the committee, such debentures to be issued in denominations of \$50, \$100, \$500 and \$1000, to be registered as to both principal and interest, to be dated as of the date of delivery of the deed by the referee in foreclosure to the New Company, and to mature twenty (20) years from the date thereof. It was further provided that said debentures should bear interest at a rate not exceeding six percent per annum as the directors in their sole discretion should declare out of the net earnings of each calendar year.

It was further provided that under the plan of reorganization each assenting depositor should receive \$50 of such debentures and one share of no par value stock of the New Company for each \$100 principal amount of the certificates of deposit, and that no debentures or stock should be issued except to such depositors.

[fol. 88] 7. Thereafter and on September 27, 1933 said premises were duly conveyed to the Debtor and said Debtor entered into an indenture with Manufacturers as Trustee, providing for the issuance of its debentures provided for in the plan and due September 27, 1953. Said indenture continues in force and effect, and the Manufacturers has at all times acted and is still acting as trustee thereunder.

8. In pursuance of said plan and under the terms of said indenture there were issued and are outstanding \$254,450 principal amount of said debentures, and there remain unexchanged \$4700 principal amount of certificates of deposit, convertible into \$2350 principal amount of such debentures, or a total authorized of \$256,800 principal amount of debentures.

9. At the time of the issuance of the securities of the Debtor in pursuance of the plan and indenture, there were 205 holders of outstanding certificates of deposit.

10. In further pursuance of the plan, the Debtor borrowed the sum of \$175,000 from Poughkeepsie Savings Bank of Poughkeepsie, New York, secured by a first mortgage on the said premises, upon which mortgage there is now due and unpaid the sum of \$154,000 principal amount.

11. In pursuance of the provisions of the plan, the first directors of the Debtor were selected by the said committee, and said directors in turn elected its first officers.

12. During the years 1942, 1943 and 1944 the debtor was in a precarious condition, operating continually at a loss.

13. The financial condition of the debtor was duly disclosed from time to time to the stockholders at stockholders [fol 89] meetings and on other occasions to individual stockholders and to the indenture trustee.

14. Early in the winter of 1942 debtor was in default under the terms of the first mortgage and it was clear that something had to be done.

15. A sale was negotiated by which Chesterbrook Estates agreed to buy debtor's property for \$220,000 coupled with certain conditions as to satisfying conditional sales contracts.

16. This offer was favorably considered by debtor. One Sanford Becker, the holder of \$5000 face amount of debentures and of 50 shares of stock, opposed said sale and brought a suit in the Supreme Court to enjoin it.

17. This suit was pending at the time of annual stockholders meeting in February, 1942, at which meeting the said offer failed to receive the necessary stockholders' approval.

18. At the same time Sanford Becker made an offer to the debtor to loan or cause to be loaned to it, \$15,000 upon second mortgage. Becker's offer was conditioned upon his brother Norman Becker and himself being given control of the board of directors and the management of the debtor being put in the hands of "Trustee's Office", an organization which was attending to the management of various properties in Westchester County, the subject matter of certified mortgages which were being liquidated under Court supervision.

19. The debtor agreed to Mr. Sanford Becker's proposition, upon the condition however that stockholders be given [fol. 90] the opportunity to share in the said \$15,000 second mortgage should they so desire. And Mr. Richard Kelly, president of the debtor, wrote a letter to the stockholders advising them of this opportunity. No stockholders availed themselves thereof except Regine Becker, mother, and Emily K. Becker, wife of Sanford Becker, and Walter A. Fribourg, a friend of the Becker brothers, and with whom he shared office space.

20. Accordingly in April 1942, the Baset Company was organized, the Becker ladies and Fribourg advancing to it the \$15,000 in equal shares and the second mortgage was given. At the same time the Beckers became directors, Sanford becoming treasurer and Norman secretary of debtor, and the management was turned over to "Trustee's Office".

21. Thereafter in September, 1943, debtor being unable to pay \$3615.54 taxes owing to City of New Rochelle, Baset advanced same. Again in April, 1944, debtor being again unable to pay taxes due to New Rochelle in the sum of \$2305.09, Baset advanced same, and the same thing happened in October, 1944 in the sum of \$2001, Baset likewise advanced this amount. In all there was advanced by Baset \$7921.63. This indebtedness was repaid beginning September, 1944, by a payment of \$100 and the balance was repaid in 1945.

22. Baset found after it had advanced the \$15,000 that there were some \$8000 of operating bills unpaid on the property which had to be thereafter taken care of from rents collected. Though debtor was in default under the terms of Baset mortgage from end of 1942 to time of sale [fol. 91] of property in January, 1946, Baset never foreclosed or even threatened to foreclose.

23. Baset did however, in October, 1943, take an assignment of rents.

24. Gradually under the better management of "Trustee's Office", the elimination of expense of bus service, the saving resulting in being able to convert back from coal to oil heating, and the general increased demand for apartment space following cessation of hostilities of World

War II, the debtor for the first time in years was able for the year 1945 to show a small operating surplus.

25. The assistance rendered to debtor by the Becker women and Fribourg through Baset materially helped debtor in weathering the grave financial situation through which it struggled.

26. Beginning November 8, 1941 and down to and including June 4, 1946, Walter A. Fribourg purchased debentures of debtor in the amounts, from or through the persons and for the prices and on the dates shown on objector's Ex. 11.

27. Regine Becker acting through her sons, beginning February 2nd, 1944 and down to and including October 30, 1945, purchased debentures of the debtor in the amounts on the dates and for the prices shown on objector's Ex. 12, from a dealer in securities, E. Henry Sondheimer Co.

28. Emily K. Becker through her husband Sanford Becker and her brother-in-law Norman Becker, from May 24, 1944 to February 5, 1945, purchased debentures of the [fol. 92] debtor in the amounts and on the dates and for the prices shown and from the persons shown on objector's Ex. 13.

29. In purchasing the debentures purchased by him, Fribourg who was in the market to purchase and purchased other securities of a speculative nature, was influenced in buying debtor's debentures in part because the assessed valuation was some \$421,630 (S. M. 109). The purchase was for him just a gamble, a speculation (S. M. 108, 115).

30. There is no evidence to support a finding that Fribourg in connection with his purchases was acting on any information of an inside nature imparted to him by any officer or director of debtor—something not known to and of which the stock holders were not informed.

31. Norman Becker never purchased any of the debentures. He was pessimistic about the future of the debtor, in part because of his particular knowledge of the debtor's property, living as he did in New Rochelle, he was disturbed about the political situation, there being an influx of negro population within 10 blocks. He discussed his view point

both with his mother Regine Becker and with Fribourg (S. M. 385).

32. On the other hand Sanford Becker was optimistic about the future of debtor's property, even when its financial condition was precarious. He felt that after World War II conditions in the real estate field would approximate those following World War I, and result in an enhancement of the value of property, such as that of the debtor (S. M. 487-8).

As a matter of fact the evidence establishes that Sanford Becker was right in expecting an enhancement of the value of debtor's property after the cessation of hostilities.

33. In October 1945 the Debtor made a contract for the sale of said premises, and thereafter and in pursuance of such contract said property was conveyed on January 8, 1946 to one Calton Properties, Inc. for a total sales price of \$300,000 paid as follows:

Subject to the said first mortgage to the Poughkeepsie Savings Bank in the then unpaid principal balance of \$154,000; by cash of \$70,000 and by purchase money mortgage to the Debtor of \$76,000.

From the proceeds of said sale, the Debtor satisfied the second mortgage to Baset Realty Corporation and paid a brokerage commission of \$6000, leaving cash remaining from the said proceeds of sale of approximately \$50,000.

34. The purchase money mortgage hereinabove referred to was thereafter sold pursuant to an order of this Court for the sum of \$66,000, resulting in a total cash in the possession of the Debtor of \$118,662.17 prior to administration expenses.

35. On May 23, 1946, debtor filed an arrangement petition under Chapter XI of the Bankruptcy Act.

36. In this proceeding by order of the Referee entered upon the confirmation of an amended plan of arrangement herein there was directed to be paid to the general creditors, including the debenture holders of the debtor, amounts equivalent to 43-61/100% of the principal amount of their claims.

[fol. 94] 37. In said arrangement proceeding, Emily K. Becker filed a proof of debt in the sum of \$52,800, Regine Becker filed a proof of debt in the sum of \$44,500 and Walter A. Fribourg filed a proof of debt in the sum of \$55,000, said amounts being the respective aggregate of the face amount of debentures purchased by them as aforesaid.

38. Manufacturers filed objections to said claims on the ground that said debentures were acquired at a small percentage of par by persons in control of the debtor, concealing material facts and without fair disclosure to the other debenture holders—over-reaching. Objector claims that it would be inequitable to allow these claims, at more than the respective aggregate amount paid by them for their debentures. Upon the hearings the objector withdrew its objection to \$5000 of the Fribourg claim, being debentures for the face amount of \$5000 purchased on November 8, 1941 and March 28, 1942 for \$230 and \$250 respectively, that is, for a sum of \$480 before the Beckers became directors.

39. Though pressed by the Referee to do so, the only facts pointed out by objector which it claims should have been disclosed, were so-called offers to purchase debtor's property after the Spring of 1942 in an ever increasing amount.

40. The record does not warrant a finding of offers to purchase the debtor's said property for sums increasing in amount from the Spring of 1942.

41. All that the record establishes in this respect is that since the Spring of 1942, brokers from time to time in making inquiries about debtor's property mentioned certain [fol. 95] figures as a possible purchase price. For example, in the course of these inquiries a broker said that he thought he could get \$240,000 for the property. He was asked to submit an offer in writing but that was the last heard of it (S. M. 90). In or about November, 1944, a broker named Rubin purported to make an offer of \$250,000 in behalf of one Solomon about whom no information could be obtained (S. M. 348). In 1945 a broker in behalf of an undisclosed principal, made an inquiry as to whether an offer of \$280,000 would be accepted. To this inquiry the answer was "No", the debtor at the time

feeling that in view of the market it should try for \$300,000 (S. M. 349-350).

42. In 1944, Manufacturers the indenture trustee, had their representative inspect the property, and at Manufacturers request a broker who thought he might be able to sell the property, made an investigation aided by debtor; but no offer was forthcoming (S. M. 379-80). Mr. Sterling B. Jordan, representative of Trustee's Office when management was in their hands, saw several brokers regarding their effecting a sale and gave them information. He asked them to submit offers. None did during the three years of Trustee's Office's management (S. M. 448-9).

43. From the time that the Chesterbrook Estate offer was turned down until the time of the sale in 1946, nothing which would be called an actual firm offer was made for debtor's property.

44. In the Spring of 1944, Mr. Richard Kelly, president of debtor and a debenture holder, had a conversation with Mr. Sanford Becker in which he expressed his wish to [fol. 96] withdraw from the whole picture and to sell his debentures because of the hopelessness of the situation. Mr. Kelly at the time told Mr. Sanford Becker that Mr. William Henry Hays, vice president and a debenture owner, felt the same way. Further, Mr. Kelly told Mr. Becker that if he could find someone who would buy their stock and debentures he, Kelly, and Hays, would be glad to get out. Accordingly Becker spoke to Fribourg who caused his brother-in-law Charles G. Winter, to collaborate with Mr. Kelly in writing a letter to debtor offering to purchase debentures for a unit price of 3% of par value (Objector's Ex. 14).

45. On May 13, 1944, Mr. Kelly wrote a letter to stockholders (Objector's Ex. 15), enclosing a copy of the Winter letter advising stockholders and calling attention to the debtor's bad financial condition and stating that he expected to accept Mr. Winter's offer (S. M. 301-307).

46. No satisfactory explanation was given why Fribourg caused his offer to be made through his brother-in-law Winter (S. M. 134, 161, 171).

47. Fribourg on May 25, 1944 purchased \$15,250 face value of debentures, \$8250 from Kelly. In July and August,

1944, he purchased \$21,250 face value more including \$8500 from William Henry Hays (Objector's Ex. 11).

48. On May 5 and 9, 1944, there was purchased for Regine Becker from E. Henry Sondheimer Co. \$4000 face value of said debentures. And on May 24 and June 8, 1944, there was purchased for Emily K. Becker through said E. Henry [fol. 97] Sondheimer Co. \$2500 face value of debentures on each date, \$5000 in all (Objector's Exs. 12 & 13).

49. The debentures purchased for the Becker ladies from E. Henry Sondheimer Co. were in the first instance purchased for Fribourg and taken for the Becker ladies when Fribourg said he did not care to take them up (S. M. 211 to 229)

50. Norman Becker attended to the purchase for Emily K. Becker on November 16, 1944 of \$37,500 face value of debentures belonging to the estate of one King through the Estate's attorneys, Reynolds, Richards & McCutcheon for 10% of the face value. The record indicates that the King Estate had kept fully informed of debtor's affairs and its financial condition and were anxious to sell the Estate's debentures (S. M. 296-9, 381-4, 389, 394, Respondent's Ex. 6).

51. Norman Becker attended to the purchase for Emily K. Becker on January 5, 1945, of \$7550 face value of debentures from Young Women's Christian Association for 10% and the record indicates that Young Women's Christian Association through one Clay, a member of its investment committee, had kept fully informed of debtor's affairs and its financial condition and desired to sell its holdings for 10% (S. M. 300, 390-2, 481).

52. In June, 1944, Mr. Kelly resigned as president and director, and Norman Becker became president of debtor.

53. Sanford Becker and Norman Becker acted as agents for the Becker ladies in the purchase of debentures by them. [fol. 98] And while Sanford consulted with his mother and wife from time to time as to such purchases, the proof does not warrant a finding that the ladies exercised any discretion of their own in such purchases.

54. The record does not warrant a finding that in the purchases of debentures by the Becker ladies or Fribourg there was practiced any over-reaching or concealment or

failure to disclose to any other debenture holders material facts.

55. At all times when purchases of debentures were made by or for the Becker ladies and Fribourg, debtor was insolvent in that the aggregate of its property was not at a fair valuation sufficient in amount to pay its debts.

56. At none of the times when any debentures, which were by their terms due September 27, 1953, were purchased by or for the Becker ladies and Fribourg, had a special fund been provided for their payment by debtor; nor had any special liquidation thereof been ordered; nor was debtor in the field to settle its indebtedness on the debentures, or were these purchases unfair to debtor nor did they involve any competition with it.

#### CONCLUSIONS OF LAW

First: Upon the facts as found in passing on the proof of debt of Walter A. Fribourg, his proof of debt should not be treated as if it were a proof of debt filed by a director of debtor.

Second: Objections to the claim of Walter A. Fribourg should be dismissed and his proof of debt should be allowed for the full amount thereof, namely \$55,000.

[fol. 99] Third: Upon the facts as found in passing on the proofs of debt of Emily K. Becker and Regine Becker, their proofs of debt should be treated as if they were proofs of debt filed by directors of debtor.

Fourth: Further upon the facts as found, objections to the proofs of debt of Emily K. Becker and Regine Becker should be dismissed and their claims should be allowed for the respective amounts thereof, namely: Emily K. Becker's proof of debt allowed for \$52,800 and Regine Becker's proof of debt allowed for \$44,500.

Fifth: Costs should be taxed against Manufacturers for the debtor's copy of the stenographic minutes, namely the sum of \$218.90.

Settle order on notice in accordance with these Findings.  
Dated, New York, July 2nd, 1947.

Peter B. Olney, Referee.

[fol. 100] IN UNITED STATES DISTRICT COURT

MEMORANDUM OF LAW OF REFEREE PETER B. OLNEY

[Same Title]

I, Peter B. Olney, the Referee in charge of the above entitled matter, do hereby file my Memorandum of Law as to the objections to the claims of Emily K. Becker, Regine Becker and Walter A. Fribourg.

The law seems to be well settled that a director may acquire for himself unmatured obligations of the corporation of which he is a director and enforce same for the full face amount thereof, even if at the time he so acquired said obligations the corporation is insolvent, provided that at said time the debtor had not provided any special fund to pay said obligation, nor any special liquidation had been ordered through the institution of Receivership or kindred proceedings, nor was the debtor in the field to settle its said obligations, nor was the acquiring of such obligations by the director unfair to the debtor nor involved competition with it, and again provided of course, that in acquiring such obligations the director was not guilty of over-reaching by unfairly using his special knowledge in dealing with those from whom he acquired the obligations.

Seymour v. Spring Forest Cemetery Ass'n., et al.,  
144 N. Y. 333.

Claire Neon Lights, Inc. v. Federal Electric Co. Inc.,  
250 App. Div. N. Y. 510, 517.

Nauben v. Morris, 255 App. Div. N. Y. 35, 46 aff'd.  
281 N. Y. 652.

Ripperger v. Allyn, D.C.N.Y. 25 Fed. Sup. 554.  
Compare Securities Exchange Commission v.  
Cheney Corp., 318 U. S. 80, 85-86, 1943.

The cases relied upon by objector will upon examination of the facts be found to contain one or more of the elements referred to above which preclude a director from enforcing at their face amounts obligations of his corporation acquired by him.

In Los Angeles Lumber Products Co. D. C. S. D. Cal., Central Division, 46 Fed. Supp. 77, 1941, upon which objector greatly relied, a director acquired obligations of a

debtor after it had become insolvent and reorganization had been authorized.

This decision does not sustain objector's contention that insolvency alone is sufficient to preclude a director's acquiring his corporation's obligations and enforcing same for their face amount as distinguished from the amount paid for them only.

In so far as anything said in Los Angeles Lumber Products Co. tends to support objector's contention, it is at variance with the other cases cited above and with the principles laid down in *Securities Exchange Commission v. Chenery*, *supra*, and cannot be taken as an authority for objector's contention.

Dated, New York, July 2nd, 1947.

Peter B. Olney, Referee.

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[fol. 102] IN UNITED STATES DISTRICT COURT

ORDER OF REFEREE PETER B. OLNEY

[Same Title]

Walter A. Fribourg having filed his proof of debt herein in the sum of \$55,000; and Emily K. Becker having filed her proof of debt herein in the sum of \$52,800; and Regine Becker having filed her proof of debt herein in the sum of \$44,500; and objections thereto having been filed by the Manufacturers Trust Company, individually and as Indenture Trustee; and a hearing on the said objections having thereafter come on to be heard before me; and the objector and the claimants having submitted their respective proofs; and findings of fact and conclusions of law having thereafter been made by me dated July 2, 1947; and upon filing my memorandum opinion dated the same date, it is now

Ordered: That the aforementioned objections filed by the Manufacturers Trust Company, individually and as Indenture Trustee, be and the same hereby are dismissed, and the claims of the said Walter A. Fribourg, Emily K. Becker and Regine Becker be and the same hereby are allowed as filed in the sums respectively of \$55,000, \$52,800 and \$44,500; and it is further

Ordered: That the cost of the stenographer's minutes paid by the debtor in the sum of \$218.90 shall be taxed against the Manufacturers Trust Company, the objector.

Dated, New York, July 11th, 1947.

Peter B. Olney, Referee in Bankruptcy.

[fol. 103] IN UNITED STATES DISTRICT COURT

PETITION FOR REVIEW

[Same Title]

To the Honorable Peter B. Olney, Referee in Bankruptcy:

The petition of Manufacturers Trust Company, a creditor of the Debtor, individually and as Indenture Trustee, respectfully represents:

1. Your petitioner is aggrieved by the order herein of the Honorable Peter B. Olney, Referee in Bankruptcy, dated July 11, 1947, a copy of which order is annexed hereto, marked Exhibit A, and made a part hereof.
2. The Referee erred in respect to said order in that in his finding of fact numbered 12 he failed to find that the Debtor was in a precarious condition during the year 1945 as the evidence clearly shows.
3. The Referee erred in respect to said order in that the Referee's finding of fact numbered 13, stating that the financial condition of the Debtor was fully disclosed from time to time to the stockholders at stockholders' meetings and on other occasions to individual stockholders and to the Indenture Trustee, was clearly erroneous and further that the Referee erred in failing to find that the maximum number of stockholders present in person at any of such meetings, other than the directors, their nominees and their associates (the three creditors here involved) was three and that no disclosure was made at any such meeting of the inquiries and offers received with a view to the purchase of the property of the Debtor.
4. The Referee erred in respect to said order in that the Referee's findings of fact numbered 18, 19 and 20, stating in substance that Sanford Becker had made an offer

to loan the Debtor \$15,000 upon the condition that he and his brother be given the control of the Debtor; that the [fol. 104] Debtor agreed to the aforesaid proposition upon the condition that the stockholders be given an opportunity to share in this \$15,000 loan which was to be secured by a second mortgage; that no stockholders except the three creditors here involved availed themselves of the opportunity of making such loan; and that the three creditors here involved accordingly formed the Baset Company to make such loan of \$15,000, were clearly erroneous, and the Referee further erred in failing to find that Sanford Becker early in 1942 was cognizant of the financial embarrassment of the Debtor and, seeing an opportunity to obtain control of the Debtor at a nominal expense, caused a group consisting of the three creditors here involved to be formed in order to obtain such control; that in pursuance of such plan to obtain control of the Debtor, Sanford Becker, at the stockholders' meeting held in February, 1942, stated on behalf of this group, whose identity he did not disclose, that he had a client who would loan \$15,000 to the Debtor to be secured by a second mortgage loan on the Debtor's property; that this offer made by Sanford Becker's clients was accepted; that it was not until after its acceptance, when it was apparent that none of the other stockholders were interested in making such loan, that the stockholders as a group were given an opportunity to participate therein; and accordingly Sanford Becker and the aforesaid group, being the three creditors here involved, were thus able to gain control of the Debtor.

5. The Referee erred in respect to said order in that the Referee's finding of fact numbered 29, stating that in purchasing the debentures purchased by him Fribourg was in the market to purchase and purchased other securities [fol. 105] of a speculative nature and was influenced in buying the Debtor's debentures in part because the assessed valuation of the Debtor's property was some \$421,630 and that the purchase was for him just a gamble and a speculation, was clearly erroneous and further that the Referee erred in failing to find that Fribourg was affiliated with Messrs. Becker and was apprised by them of all facts and circumstances in connection with the inquiries and offers being made with a view to the purchase of the Debtor's property and that accordingly his purchases of

the Debtor's debentures was not based in part upon the assessed valuation of the Debtor's property but upon inside information received by him from the directors and officers of the Debtor.

6. The Referee erred in respect to said order in that the Referee's finding of fact numbered 30, stating that there was no evidence to support a finding that Fribourg in connection with his purchases was acting on any information of an inside nature imparted to him by any officer or director of the Debtor, i. e., something not known to and of which the stockholders were not informed, was clearly erroneous.

7. The Referee erred in respect to said order in that the Referee's finding of fact numbered 31, stating that Norman Becker was pessimistic about the future of the Debtor, in part because of his particular knowledge of the Debtor's property, living as he did in New Rochelle, and that he was disturbed about the political situation, there being an influx of negro population within ten blocks and that he discussed his viewpoint both with his mother Regine Becker and with Fribourg, was clearly erroneous.

[fol. 106] 8. The Referee erred in respect to said order in that the Referee's finding of fact numbered 32, stating that Sanford Becker was optimistic about the future of the Debtor's property even when its financial condition was precarious and felt that after World War II conditions in the real estate field would approximate those following World War I and result in an enhancement of the value of property, such as that of the Debtor, and that the evidence established that Sanford Becker was right in expecting an enhancement of the value of the Debtor's property after the cessation of hostilities, was clearly erroneous, inasmuch as said finding fails to give effect to the special knowledge and information possessed by Sanford Becker as an officer and director of the Debtor.

9. The Referee erred in respect to said order in that the Referee's finding of fact numbered 38, stating that Manufacturers Trust Company filed objections to said claims on the ground that said debentures were acquired at a small percentage of par by persons in control of the Debtor, concealing material facts and without fair disclosure to the other debenture holders—overreaching, was clearly erroneous.

ous and further the Referee erred in failing to find that Manufacturers Trust Company filed objections to said claims on two grounds; namely, to wit: that said debentures were acquired by relatives, associates and affiliates of the directors and officers of the Debtor on behalf of some of whom the said directors and officers acted as agents while the Debtor was insolvent; and further as a separate and distinct objection, that while the Corporation was insolvent such persons acquired these debentures while concealing material facts and without appropriate and fair disclosure to the sellers thereof of the facts in connection with the situation.

[fol. 107] 10. The Referee erred in respect to said order in that the Referee's finding of fact numbered 39, stating that the only facts pointed out by the objector which it claims should have been disclosed were so-called offers to purchase the Debtor's property after the Spring of 1942 in an ever increasing amount, was clearly erroneous and further that the Referee erred in failing to find that the evidence established that inquiries with a view to the purchase of the Debtor's property were being received at least once a month, that two bona fide offers were received and that such inquiries and offers indicated a rising value of the Debtor's property.

11. The Referee erred in respect to said order in that the Referee's finding of fact numbered 40, stating that the record does not warrant a finding of offers to purchase the Debtor's property for sums increasing in amount from the Spring of 1942, was clearly erroneous.

12. The Referee erred in respect to said order in that the Referee's finding of fact numbered 41, stating that all that the record establishes in respect to the aforementioned so-called offers is that since Spring 1942 brokers from time to time in making inquiries about the Debtor's property mentioned certain figures as a possible purchase price, for example, in the course of these inquiries a broker said that he thought he would get \$240,000 for the property for which he was asked to submit an offer in writing but that was the last heard of it; that in or about November, 1944, a broker named Rubin purported to make an offer of \$250,000 in behalf of one Solomon about whom no information could be obtained; that in 1945 a broker in behalf of an undisclosed

principal made an inquiry as to whether an offer of \$280,000 [fol. 108] would be accepted, to which inquiry the answer was "No", the Debtor at the time feeling that in view of the market it would try for \$300,000, was clearly erroneous.

13. The Referee erred in respect to said order in that the Referee's finding of fact numbered 43, stating that from the time that the Chesterbrook Estates offer was turned down until the time of the sale in 1946 nothing which could be called an actual firm offer was made for the Debtor's property, was clearly erroneous, and further that the Referee erred in failing to find that two firm offers were made for the Debtor's property between the date of the Chesterbrook Estates offer and the offer which was finally accepted.

14. The Referee erred in respect to said order in that the Referee's finding of fact numbered 44, stating that in the Spring of 1944 Mr. Richard Kelly, president of the Debtor and a debenture holder, had a conversation with Sanford Becker in which he expressed his wish to withdraw from the whole picture and to sell his debentures because of the hopelessness of the situation; that Mr. Kelly at the time told Sanford Becker that Mr. William Henry Hays, vice president and a debenture holder, felt the same way; that Kelly told Sanford Becker that if he could find someone who would buy their stock and debentures, he, Kelly, and Hays would be glad to get out and that accordingly Becker spoke to Fribourg who caused his brother-in-law Charles G. Winter to collaborate with Kelly in writing a letter to the Debtor offering to purchase debentures for a unit price of 3% of par value, was clearly erroneous, and further that the Referee erred in failing to find that Fribourg, seeking to purchase more securities of the Debtor, persuaded his brother-in-law, Charles G. Winter to make an offer for such securities through the Corn Exchange Bank, had Norman Becker introduce the said Charles G. Winter to said Bank and that thereupon Fribourg purchased through the medium of Charles G. Winter certain securities of the Debtor without in any manner disclosing to the sellers thereof the true facts in connection with the Debtor's property or his connection with the Debtor's directors and officers.

15. The Referee erred in respect to said order in that the Referee's finding of fact numbered 50, stating that the record indicates that the King Estate had kept fully informed of the Debtor's affairs and its financial condition and were anxious to sell the Estate's debentures, was clearly erroneous, and further that the Referee erred in failing to find that the King Estate had not been furnished with any information with respect to the inquiries and offers received with a view to the purchase of the Debtor's property.

16. The Referee erred in respect to said order in that the Referee's finding of fact numbered 51, stating that the record indicates that the Young Women's Christian Association through one Clay, a member of its investment committee, had kept fully informed of the Debtor's affairs and its financial condition and desired to sell its holdings for 10% was clearly erroneous, and further that the Referee erred in failing to find that the representatives of the Young Women's Christian Association had not been furnished any information with respect to the inquiries and offers which were received with a view to the purchase of the Debtor's property.

[fol. 110] 17. The Referee erred in respect to said order in that the Referee's finding of fact numbered 54, stating that the record does not warrant a finding that in the purchase of debentures by the Becker ladies or Fribourg there was practiced any overreaching or concealment or failure to disclose to any other debenture holders material facts, was clearly erroneous and further that the Referee erred in failing to find that in the purchase of the debentures by Mesdames Becker or Fribourg there had been overreaching, concealment and failure to disclose to the sellers of such debentures material facts in connection with the property of the Debtor.

18. The Referee erred in respect to said order in that the Referee failed to find that the Debtor was insolvent in the equity sense from 1942-1945, inclusive, in that it could not pay its debts as they matured in the ordinary course of business.

19. The Referee erred in failing to find that the acquisition of the Debtor's debentures by the Mesdames Becker and Fribourg was a concerted plan of acquisition which

the participants therein knew would result in a profit to them by virtue of information which they had received from directors and officers of the Debtor.

20. The Referee erred in failing to find that the Mesdames Becker, through their agents, and Fribourg, in order to obtain the debentures and to carry out their concerted plan of acquisition of the same, conducted a circularization campaign through Sondheimer & Company on the basis of a list of security holders furnished by Fribourg and solicited the sale of the same in the name of Charles G. Winter, the necessary funds being supplied by Fribourg.

[fol. 111] 21. The Referee erred in failing to find that Mesdames Becker and Fribourg deliberately concealed their identities when purchasing the Debtor's securities by use of the circularization campaign conducted through Sondheimer & Company and by the solicitation in the name of Charles G. Winter heretofore mentioned.

22. The Referee erred in failing to find that the sellers of the debentures were in every instance stockholders as was known by all participants in the matter and that no annual report to stockholders was furnished after the year 1943, and the annual report for the year 1943 was in the form of a postscript to the notice of the annual stockholders meeting and contained no information with respect to any of the developments which had occurred in connection with the Debtor's property.

23. The Referee erred in respect to said order in that the Referee's conclusion of law numbered First, holding that Walter A. Fribourg's proof of debt should not be treated as if it were a proof of debt filed by a director of the Debtor, was clearly erroneous. The error consists in the fact that the Referee disregarded well-established principles of law that not only are directors and officers of an insolvent corporation disqualified from profiting by transactions in said insolvent debtor's securities which they acquired by taking advantage of their knowledge as insiders without appropriate disclosure to the sellers of such securities and therefore are not allowed to profit by reason of their overreaching but also the same principles apply to persons who are associated with them and who are not officers or directors.

24. The Referee erred in respect to said order in that the Referee's conclusion of law numbered Second, holding [fol. 112] that the objections to the claim of Walter A. Fribourg should be dismissed and his proof of debt should be allowed for the full amount of \$55,000, was clearly erroneous. The error consists in the fact that the Referee disregarded well-established principles of law that directors of an insolvent corporation and persons affiliated with them, related to them or acting in conjunction with them, can not profit from any dealings in securities of said insolvent corporation, and, in conjunction therewith, or in the alternative, that they may not profit on purchases of securities of the insolvent debtor which they acquired by taking advantage of their knowledge as insiders without appropriate disclosure to the sellers of such securities and therefore are not allowed to profit by reason of their overreaching, and that at best they may recover from the estate of the Debtor only the amounts actually expended by them with interest.

25. The Referee erred in respect to said order in that the Referee's conclusion of law numbered Fourth, holding that the objections to the proofs of debt of Emily K. Becker and Regine Becker should be dismissed and their claims should be allowed for the respective amounts of \$52,800 and \$44,500, was clearly erroneous. The error consists in the fact that the Referee disregarded well-established principles of law that directors of an insolvent corporation and persons affiliated with them, related to them or acting in conjunction with them, can not profit from any dealings in securities of said insolvent corporation, and, in conjunction therewith, or in the alternative, that they may not profit on purchase of securities of the insolvent debtor which they acquired by taking advantage of their knowledge as insiders without appropriate disclosure to the sellers of such securities and therefore are not allowed [fol. 113] to profit by reason of their overreaching, and that at best they may recover from the estate of the Debtor only the amounts actually expended by them with interest.

26. The Referee erred in respect to said order in that the Referee failed to find as a conclusion of law that because the Debtor was insolvent at all times during the years 1942-1946, both inclusive, the directors and persons affiliated with them, related to them or acting in conjunction

with them, can not profit from any dealings in securities of the Debtor, and that at best they may recover from the estate of the Debtor only the amounts actually expended by them with interest.

27. The Referee erred in respect to said order in that the Referee failed to find as a conclusion of law that the three creditors are disqualified from profiting by transactions in the Debtor's securities, because they acquired the debentures in question by taking advantage of their knowledge as insiders without appropriate and adequate disclosure to the sellers of such securities and therefore should not be allowed to profit by reason of their over-reaching.

28. The Referee erred in respect to said order in that the Referee's conclusion of law numbered Fifth, holding that costs should be taxed against Manufacturers for the Debtor's copy of the stenographic minutes in the sum of \$218.90 was clearly erroneous, inasmuch as the objections of Manufacturers, as amended upon the hearing thereon, should have been sustained, and further that the Debtor was not an adverse party to this proceeding and consequently did not require a copy of said minutes.

[fol. 114] Wherefore your petitioner prays that said order be reviewed by a judge in accordance with the provisions of the Act of Congress relating to Bankruptcy and the General Orders applicable thereto, that said order be vacated and set aside, that Manufacturers' objections to the proofs of debt of Walter A. Fribourg, Emily K. Becker and Regine Becker, as amended, be sustained, and that the petitioner have such other and further relief in the premises that may be just and proper.

Dated: New York, N. Y., July 18th, 1947.

Manufacturers Trust Company, Petitioner, by Frank P. Gage, Trust Officer.

Beckman & Bogue, by Leslie B. Soper, a Partner, Attorneys for Petitioner, No. 15 Broad Street, New York 5, New York.

(Verified by Frank P. Gage, July 18, 1947.)

(The Referee's order referred to in paragraph 1 of the foregoing petition is printed at page 102, *supra*, and therefore is here omitted.

[fol. 115] IN UNITED STATES DISTRICT COURT

## CERTIFICATE OF REFEREE PETER B. OLNEY

[Same Title]

To the Honorable the Judges of the District Court of the United States for the Southern District of New York

I, Peter B. Olney, the Referee in charge of the above entitled proceeding, do hereby certify pursuant to Section 39 a(8) as follows:

The question certified for review is whether as Referee I erred in making the order dated July 11, 1947, sought to be reviewed and herewith submitted, in and by which I dismissed the objections to the claims of Walter A. Fribourg, Emily K. Becker and Regine Becker and allowed the same as filed in their respective sums. More specifically, error is claimed in that the Referee erred in his order in the respects set forth in the petition to review verified July 18, 1947, and submitted herewith, in that he erred in Findings 13, 18, 19, 20, 29, 30, 31, 32, 38, 39, 40, 41, 43, 44, 50, 51 and 54, and in failing to find as set forth in paragraphs 2, 18, 19, 20, 21 and 22 of said petition to review, and further erred in Conclusions of Law First, Second, Fourth and Fifth, and in failing to find Conclusions of Law in the respects set forth in paragraphs 26 and 27 of said petition to review.

The facts are as found in Referee's Findings of Fact and Conclusions of Law dated July 2, 1947, herewith submitted.

There is also submitted herewith the following claims: Walter A. Fribourg in the sum of \$55,000 verified October 28, 1946; Emily K. Becker in the sum of \$52,800 verified October 23, 1946, and Regine Becker in the sum of \$44,500 verified October 24, 1946; objections to said claims verified December 6, 1946; Referee's Memorandum of Law dated July 2, 1947, and stenographic record of the hearings [fol. 116] on said objections to said claims, and the exhibits.

Respectfully submitted, Peter B. Olney, Referee.

Dated, New York, July 23, 1947.

Hearing on above certificate will be on the bankruptcy motion calendar in the United States Court House, Foley

Square, New York City, on Wednesday, July 30th, 1947,  
at 10:30 A. M.

Peter B. Olney, Referee.

IN UNITED STATES DISTRICT COURT

OPINION OF GODDARD, D. J.

[Same Title]

GODDARD, District Judge:

This is a petition to review the order of a referee in bankruptcy overruling the objections of an Indenture trustee and creditor to the allowance of the claims in full of three creditors, Regine Becker, Emily K. Becker and Walter A. Fribourg. The claims are founded upon debenture bonds of the debtor corporation owned by the three creditors. The trustee contended that in each instance these claims should be limited to the amount paid by the creditor for such debentures.

The amounts of these claims as filed and allowed on which a dividend of 43.61% is contemplated, and the cost to [fol. 117] the creditors of the respective debentures which is the basis for their claims, are as follows:

	Amount and Allowance of Claim	Cost
Regine Becker	\$44,500.	\$3,060.63
Emily K. Becker	52,800.	5,010.00
Walter A. Fribourg	55,000.	2,604.80

The debtor owned and operated an apartment house in New Rochelle, New York, known as the Calton Court Apartments, which it had taken over upon default of a mortgage in September, 1933 and twenty years debentures in the amount of \$256,800 were issued, the Manufacturers Trust Company [the objector] serving as Indenture trustee. A loan of \$175,000 secured by a first mortgage was obtained from the Poughkeepsie Savings Bank. In 1941, prior to the time the Beckers became officers of the corporation which was in April, 1942, Sanford Becker and Fribourg, a friend of the Beckers, purchased some of the debentures in the open market. From 1941 until 1945 Regine Becker, mother, and Emily K. Becker, wife of

Sanford Becker, as well as others, purchased debentures in the open market. In 1942 the debtor, which had been operating at a loss, was in default on the mortgage held by the Poughkeepsie Bank and it was decided to obtain \$15,000 on a second mortgage. All stockholders were given an opportunity to participate in making this loan, but the only ones who responded were Regine Becker, Emily K. Becker and Fribourg, who advanced the \$15,000 in equal shares. In February, 1942 an offer of \$220,000 was received for the property but failed to receive the necessary stock-holders' approval. On January 8, 1946 the property was sold for \$300,000 subject to the Poughkeepsie Bank's mortgage of \$154,000, \$70,000 in cash and the debtor taking back a purchase money mortgage of \$76,000, which was sold by order of the court for \$66,000, netting the debtor some \$115,000 after satisfying the second mortgage of \$15,000 and paying broker's commissions of \$6,000.

On May 23, 1946 the debtor filed an arrangement petition under chapter XI of the Bankruptcy Act.

The trustee withdrew its objection to \$5,000 of the Fribourg claim as these debentures had been purchased prior to the time the Becker-Fribourg group took over control of the debtor. The basis for the trustee's objections was twofold, namely—

[1] That the debtor was insolvent at all times during the years 1942-1945, both inclusive, when the debentures in question were acquired, and that the directors and persons, such as the three creditors, affiliated with them, related to them or acting in conjunction with them, cannot profit from any dealings in securities of the debtor, and at best may only recover the amounts actually expended, with interest, for the purchase of the debentures; [2] that the said three creditors are disqualified from profiting from transactions in the debtors' securities, because they acquired the debentures in question by taking advantage of their knowledge as insiders without appropriate and adequate disclosure to the sellers of such securities and therefore should not be allowed to profit by reason of their overreaching.

The referee held that "The law seems to be well settled that a director may acquire for himself unmatured obligations of the corporation of which he is a director and enforce same for the full face amount thereof, even if at

[fol. 119] the time he so acquired said obligations the corporation is insolvent, provided that at said time the debtor had not provided any special fund to pay said obligation, nor any special liquidation had been ordered through the institution of Receivership or kindred proceedings, nor was the debtor in the field to settle its said obligations, nor was the acquiring of such obligations by the director unfair to the debtor nor involved competition with it, and again provided of course, that in acquiring such obligations the director was not guilty of overreaching by unfairly using his special knowledge in dealing with these from whom he acquired the obligations."

The referee in rendering his opinion made detailed findings of fact to support his conclusions. Among these findings are the following:

"54. The record does not warrant a finding that in the purchases of debentures by the Becker ladies or Fribourg there was practiced any overreaching or concealment or failure to disclose to any other debenture holders material facts.

55. At all times when purchases of debentures were made by or for the Becker ladies and Fribourg, debtor was insolvent in that the aggregate of its property was not at a fair valuation sufficient in amount to pay its debts.

56. At none of these times when any debentures, which were by their terms due September 27, 1953, were purchased by or for the Becker ladies and Fribourg, had a special fund been provided for their payment by the debtor; nor had any special liquidation thereof been ordered; nor was the debtor in the field to [fol. 120] settle its indebtedness on the debentures; nor were these purchases unfair to debtor nor did they involve any competition with it."

The referee found as a conclusion of law that Fribourg's proof of debt should not be treated as if it were a proof of debt filed by a director of the debtor. While it is immaterial to the disposition of this review, I am persuaded that the evidence warrants a finding that the relationship between Fribourg and the Beckers [directors] was of such a nature with respect to the affairs of the debtor so as to treat his proof of debt as a proof of debt of a director.

Although it is true that federal bankruptcy law, not state law, governs the distribution of a bankrupt's assets to its creditors [*Prudence Realization Corp. v. Geist*, 316 U. S. 89; *American Surety Co. v. Sampsell*, 327 U. S. 269; *Heiser v. Woodruff*, 327 U. S. 726; *Vanston Bondholders Protective Committee v. Green*, 329 U. S. 156] the validity of a claim, in the absence of overruling federal law, is determined with reference to state law. *Vanston Bondholders Protective Committee v. Green*, *supra*; *Remington on Bankruptcy*, Vol. 2, Sec. 975.

The law applied by the referee is the law of New York when the corporation is a going concern. *Moore Constr. Co. v. U. S. Fidelity & Guarantee Co.*, 293 N. Y. 119, 125; *Seymour v. The Spring Forest Cemetery Association, et al.*, 144 N. Y. 333; *Claude Neon Lights, Inc. v. Federal Electric Company, Inc.*, 250 App. Div. 510; *Hauben v. Morris*, 255 App. Div. 3, affirmed 281 N. Y. 652; *Ingelhart v. Thousand Islands Hotel*, 32 Hun 377; *Oelberman v. N. Y. & Northern R. Co.*, 14 Misc. 131.

The rule that directors and those who occupy a similar [fol. 121] position may acquire the unmatured obligations of a going concern and enforce the same for the full face amount if such purchase is fair to the corporation and involves no competition with the corporation, has been approved and followed in this district. *Ripperger v. Allyn, et al.*, 25 Fed. Supp. 554; *Patterson, D. J.*, Southern District of New York.

A group of cases have held that officers, directors and attorneys of a corporation may not, *while the corporation is insolvent*, purchase claims against it at a discount and then enforce such claims in a subsequent bankruptcy proceeding at their full face value. *Monroe v. Scofield*, 135 F. (2nd) 725; *In re Philadelphia & Western Ry. Co.*, 64 F. Supp. 738; *In re Los Angeles Lumber Products Co.*, 46 F. Supp. 77; *In Re McCrory Stores Corp.*, 12 F. Supp. 267; *In re Jersey Materials Co.*, 50 F. Supp. 428.

The above cases deal with situations where some type of bankruptcy proceeding was imminent and was known to be so by the officer, director, or person affiliated with them who made the purchases.

However, these cases do not seem to cover a situation where the corporation, although insolvent in a bankruptcy sense, is still a "going concern" for the mere fact that a

corporation is insolvent does not dissolve the corporation and make the directors mere trustees of its assets if it is still a "going concern". *White, Potter & Paige Mfg. Co. v. Pettes Importing Co.*, 30 Fed. 864; *Contra Costa Water Co. v. City of Oakland*, 113 P. 668, 682, 159 Cal. 323; *Public Market Co. of Portland v. City of Portland*, 130 F. (2nd) 624, 646, 171 Or. 522; *Michigan Wolverine Student Co-op. v. Wm. Goodyear & Co.*, 22 N. W. 2nd, 884, 888, 314 Mich. 580. This distinction as to the duty of a director when the corporation, although insolvent is [fol. 122] a going concern, was recognized in *Sanford Tool Co. v. Howe, Brown & Co.*, 157 U. S. 312; see *Asheville Lumber Co. v. Hyde*, 172 Fed. 730, 733.

In the case at bar these purchases were made when the corporation was a going concern and in later years even began to show an operating surplus. Although the referee made a finding of insolvency, it does not appear that the referee in making this finding used a going concern valuation. *Pacific Lumber Co. v. Bargar*, 10 F. (2nd) 335; *In re Nathanson Bros. Co.*, 64 F. (2nd) 912.

At all the times that these purchases were being made these securities of the debtor were being traded in over the counter market. Under these circumstances the referee was right in applying the rule as laid down in the New York cases. The cases which appear to have language to the contrary are clearly distinguishable on their facts. The purchases of the debentures in question were made long before the filing of the petition under Chapter XI of the Bankruptcy Act, on May 23, 1946, or before contemplation of filing the petition, in some instances—months, and in others—years.

The referee further found that a finding that overreaching or concealment was practiced in the purchase of these securities was not warranted. The record does not show that this finding was clearly erroneous and hence must be confirmed. *General Order 47; In re Rosenberg*, 145 F. (2nd) 896, 898 (C. C. A. 2).

The referee's order including the taxation of the cost of stenographer's minutes is therefore confirmed in all respects.

Henry W. Goddard, U. S. D. J.

July 13, 1948.

[fol. 123] IN UNITED STATES DISTRICT COURT

ORDER OF GODDARD, D. J., HERE APPEALED FROM

[Same Title]

An order having been made herein by Referee Peter B. Olney, Referee in Bankruptcy, dated July 11, 1947, dismissing objections filed by Manufacturers Trust Company, individually and as Indenture Trustee, to the claims of Walter A. Fribourg, Emily K. Becker and Regine Becker, in the sums respectively of \$55,000, \$52,800 and \$44,500, and allowing the said claims in such amounts; and the said Manufacturers Trust Company, individually and as Indenture Trustee, having thereafter filed a petition for the review of the said order; and the Referee having filed his certificate upon the said petition to review; and argument upon the said petition for review having come on before me on April 21, 1948; after hearing Messrs. Beekman & Bogue (Edward K. Hanlon, Esq., of counsel) in support of the petition to review; and David W. Kahn, Esq., attorney for the aforementioned claimants, in opposition; and due deliberation having been had, and upon filing the opinion dated July 13, 1948, it is on motion of David W. Kahn, attorney for the claimants,

## ORDERED:

1. That the petition to review aforementioned be and the same hereby is denied and the order of Referee Olney, dated July 11, 1947, be and the same hereby is in all respects affirmed.
2. That the claimants herein be and they hereby are authorized to tax the cost of the stenographer's minutes paid by them, in the sum of \$218.90, against the said Manufacturers Trust Company, individually and as Indenture Trustee, and to have judgment therefor.

Dated, New York, July 20, 1948.

Henry W. Goddard, U. S. D. J.

[fol. 124] IN UNITED STATES DISTRICT COURT

**NOTICE OF APPEAL**

[Same Title]

SIRS:

Notice is hereby given that Manufacturers Trust Company, individually and as indenture trustee, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the order of this Court entered herein in this proceeding on July 21, 1948, affirming an order of Referee Peter B. Olney dated July 11, 1947, and from each and every part of the order appealed from.

Dated: New York, N. Y., August 4, 1948.

Yours, etc. Beekman & Bogue, Attorneys for Appellant, Manufacturers Trust Company, Office & P. O. Address, 15 Broad Street, New York 5, New York.

To: David W. Kahn, Esq., Attorney for Appellees, 120 Broadway, New York 5, New York;

Clerk of the United States District Court for the Southern District of New York.

[fols. 125-127] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of CALTON CRESCENT, INC., Debtor

MANUFACTURERS TRUST COMPANY as trustee under an Indenture made by the debtor under date of September 27, 1933 and individually, Objector-Appellant,

against

REGINE BECKER, EMILY K. BECKER and WALTER A. FRIBOURG,  
Claimants-Appellees

Appendix to Appellee's Brief—Filed December 31, 1948

[fol. 128] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

(In Bankruptcy)

No. 84,684

In the Matter of CALTON CRESCENT, INC., Debtor

EXTRACTS FROM STENOGRAPHIC MINUTES OF THE HEARING BEFORE REFEREE OLNEY

New York, December 30, 1946, 10:00 o'clock A. M.

Before: HON. PETER B. OLNEY, Referee.

HEARING OF OBJECTIONS TO CLAIMS OF WALTER A. FRIBOURG,  
EMILY K. BECKER AND REGINE BECKER

Proceeded Pursuant to Notice

APPEARANCES:

Messrs. Beekman & Bogue, Attorneys for Manufacturers Trust Company, Indenture Trustee, Objectant; by Edward K. Hanlon, Esq., of Counsel.

Messrs. Monfried & Monfried, Attorneys for Walter A. Fribourg, Emily K. Becker and Regine Becker, Respondents; by Richard M. Monfried, Esq., of Counsel, and David W. Kahn, Esq., of Counsel.

## [fol. 129] EXTRACTS FROM TESTIMONY OF SANFORD BECKER

Page 37

By Mr. Hanlon:

Q. But you do remember that you felt that \$220,000 was not enough money for this property in 1942?

A. I do know at that time my opinion was that if they sold it for two hundred and twenty they would receive nothing, so the best thing they could do would be to stay in business.

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Pages 59-61

Q. These minutes of the directors' meeting on April 7, 1942, Objectant's Exhibit 8, in reference to this mortgage incorporate the letters from Mr. Myles B. Amend who was then counsel for the debtor, was he not?

A. I believe he was.

Q. In which he says: "I acknowledge receipt from Baset Realty Corporation of two checks of Sanford Becker, one for \$12,500 and the other for \$2,500, representing the loan to be secured by the bond and mortgage above referred to." You did deliver two checks, did you, to Mr. Amend in the amounts named and for the purpose stated?

A. Well, there would be more circumstances to that than that letter states.

Q. I am asking you a simple question. You delivered two checks to him?

A. I did not.

Q. What did you do with the two checks?

A. I gave—I collected the money for the mortgage.

The Referee: What did you do with the two checks?

The Witness: Gave it to Mr. Eisenberg as I stated.

[fol. 130] Q. Mr. Milton Eisenberg?

A. That is correct.

Q. He was representing you in the transaction?

A. He was representing the second mortgagees.

The Referee: To whom were the checks drawn?

The Witness: I imagine they were drawn to Calton Crescent.

Mr. Hanlon: I think that is so, your Honor.

Q. And from what source were the funds obtained?

A. From the three individuals.

Q. That is, your wife, your mother and Mr. Fribourg?

A. Mr. Fribourg.

Q. And the checks were your personal checks?

A. The checks were drawn on my special account.

Q. On your special account?

A. Yes.

The Referee: Did Mr. Fribourg, your wife and your mother have bank accounts?

The Witness: Yes, sir.

The Referee: Why weren't the checks drawn on their own bank accounts?

The Witness: Because Mr. Fribourg was not in town at the time, and I had certain funds belonging to my mother and my wife, and I had access to them; and I got the money together so I could give them one check.

The checks were drawn in two parts for a particular purpose; the \$12,500 was drawn in one check and the \$2,500 was drawn in a check which was to be held in escrow for all bondholders to participate in that mortgage. A letter sent out to bondholders stated they could, if they wished, participate in that mortgage.

[fol. 131] The \$2,500 check was to be held in escrow until such time as they had time to answer.

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Pages 64-65

Q. By the way, Mr. Becker, were you yourself an officer of Baset Realty Corporation?

A. I don't believe so. I may have been, but I don't believe so.

Q. Will you state what was done, if anything, with respect to affording the other stockholders of the debtor an opportunity to participate in this second mortgage?

A. Mr. Kelly sent out a letter to all of the stockholders and bondholders, calling their attention to the fact that the second mortgage was voted by the stockholders and was going to be placed, and asking them to participate.

Q. Did he ask them to participate or did he offer them participation?

A. He asked them to participate.

Q. He asked them?

A. He asked them to participate.

Q. Did any of them participate?

A. Actually no.

Q. Was any statement made to the stockholders in that communication or otherwise as far as you know as to who it was had advanced the money which constituted the \$15,000?

A. I don't know. There must be a copy; Mr. Kelly must have a copy of the letter, there must be somewhere in the records a copy of the letter.

Q. Did Mr. Kelly know that your mother, Mrs. Becker and Mr. Fribourg were advancing the money?

A. Yes.

Q. In what way was that information conveyed to Mr. Kelly?

A. I told him.

Q. When did you tell him?

A. Before it was done.

Q. Was that information conveyed to the board of directors?

A. Yes.

Q. (Continuing) Of the debtor?

A. Yes.

Q. In what way?

A. By telling them.

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[fol. 132] Pages 68-69

Q. Mr. Becker, I assume you are referring to the minutes of the stockholders' meeting, the annual meeting held on February 17, 1942, and I am directing your attention to one of the later pages to help you. Will you look through those and show me where you informed the meeting of the identity of the persons who were putting up the money?

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A. Yes, it is covered here by a small paragraph—in this paragraph here (indicating).

Mr. Kahn: What is that; it is in there?

Mr. Hanlon: In response to my question of a moment ago Mr. Becker has indicated to me in the minutes of the annual meeting of stockholders held on February 17, 1942

the following paragraph which I will read for the record (doing so):

"Mr. Amend stated that he had conferred with Mr. Eisenberg and that Mr. Becker would be willing to loan \$15,000 on second mortgage provided he be given the right to designate a majority of the board of directors and the right to appoint the managing agent, and Mr. Becker stated that he would increase the offer of the mortgage loan in his letter to \$15,000 accordingly."

Q. Is that the statement you indicated?

The Referee: That refers to this Becker, Sanford Becker?

Q. That refers to you, Mr. Becker?

A. Yes. It was in that conversation that I told him. [fol. 133] Q. I ask you where in the minutes it is shown?

A. That is in reference to that conversation. The minutes refer to a conversation I had with Mr. Amend and Mr. Eisenberg in which conversation I told them who the parties were that were participating in the loan.

Q. My question was directed to the meeting of the stockholders.

A. I stated it at the opening meeting, too.

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Pages 70-71

The Referee: According to the statement you made at the stockholders' meeting you made it a condition of the loan that you be permitted to have a majority on the board?

The Witness: Yes.

The Referee: Who was the third one?

The Witness: We waived that afterwards; it was changed afterwards so that only two members of the board were designated.

Mr. Kahn: Two members what?

The Witness: Only two members of the board were designated.

The Referee: How many members were there; five?

The Witness: There were at least five.

The Referee: Did you designate also the managing agent?

The Witness: Yes, we did.

The Referee: Who was that?

The Witness: That was the Westchester Trustees.

Q. Is that the full name?

#### A. Westchester Trustees.

**Q. Who are they?**

A. They are a co-operative agency which managed a good many of the issues in Westchester County for the courts.

[fol. 134] Q. You have no interest in Westchester Trustees, have you?

A. None whatsoever.

Q. Nor your brother nor Mr. Fribourg?

A. None whatsoever.

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Q. Now, what occurred after the debtor made the assignment of rents to the Baset Realty Corporation with respect to the management of the property, the collection of its income and so on?

A. The mortgagee in possession retained the managing agent to manage the building.

Q. The same agent that managed the property?

**A. The same agent.**

Q. The one that had been put in when the mortgage was put on?

A. That is correct.

Q. When I say "mortgage" I refer to the Baset mortgage.

A. That is correct.

Q. To whom did the agent make its reports and pay any money which it should have made payment of in connection with the management of the property?

A. They did not make any payment of money because they were not any moneys. They retained the moneys in their managing account.

Q. Did they make reports?

A. Yes, they made reports; one copy to us and one copy to Baset Realty, I believe.

Pages 90-91

Q. What offers were received from brokers that you just referred to?

A. A broker came in and said he thought he could get \$240,000. I asked him to submit the offer in writing, and that is the last I heard of it.

[fol. 135] Q. How frequently would you say?

A. I should say once a month at least.

Q. You had brokers coming in?

A. Yes.

Q. What was the range of the figures these brokers suggested that they thought they could get?

A. All about the same figure.

Q. In the neighborhood of two hundred and forty thousand?

A. Two hundred thirty, two hundred forty, somewhere in there.

Q. Did any of them go higher?

A. Not that I remember.

The Referee: And none of these men ever submitted a written offer?

The Witness: No, sir.

Pages 92-93

Q. And you don't remember any offers coming in, except one written offer, the name of which—

A. (Interrupting) I don't remember in whose name it was.

Q. Now, can you tell us the figure, the price?

A. My recollection is it was \$250,000.

The Referee: What did you do with the offer?

The Witness: The offer was submitted and rejected.

The Referee: Submitted to whom?

The Witness: The directors.

Q. About when was that?

A. I should say some time in '45.

The Referee: That was at the time during the control of your board of directors?

The Witness: Yes, sir.

[fol. 136] Pages 204-205

Q. Let us take up the case of your wife and your mother before we get to Mr. Fribourg, then. When had your wife and your mother seen the building?

A. Early in '42.

Q. Had they ever been inside it?

A. Never.

Q. Had they ever seen any reports or earnings statements or profit and loss statements?

A. No.

Q. Were there any other financial reports in respect to this business?

A. No.

Q. Have they any knowledge whatsoever as to the business of that building?

A. (No answer.)

Q. I say have they any knowledge?

A. Yes. They saw the building from the outside; they saw that it was tenanted, they saw the physical property.

Q. And that you will agree was the sum and substance of their knowledge of the building?

A. Yes. I told them what the first mortgage was and that this would be a second mortgage.

Pages 207-208

Q. Have they ever throughout the intervening years acquainted themselves with any of the figures or statements of the company?

A. No, none.

Q. They acted entirely as a result of their conversation with you?

A. The fact that they had a mortgage as security.

Q. I mean, Mr. Becker, they had no other information, except what was derived from you?

A. I don't know what information you mean.

Q. Information as to the business of the building, its financial affairs, its tenancy?

A. None whatsoever.

Q. In April of 1944 there was advanced for taxes due the city of New Rochelle an additional amount of \$2,305.09.

[fol. 137] That appears also from Mr. Fribourg's testimony that you, rather, your wife and your mother each

advanced one-third of that. Were the circumstances the same?

A. The same.

Q. Were the circumstances the same in connection with the third advance made in October, 1944 of \$2,000?

A. Yes.

Pages 303-304

Q. Now, with those facts in mind didn't you have some discussion about this letter with Fribourg, Kelly or Winter?

A. I know I did have with Mr. Kelly.

Q. When did you have that discussion with him?

A. We had probably been talking ever since the annual meeting.

Q. What discussion did you have with Mr. Kelly?

A. Mr. Kelly was desirous of withdrawing from the whole picture because of the hopelessness of the situation.

Q. Are you quoting from what he said to you, is this what he said?

A. You asked me in substance. Yes.

Q. Go ahead.

A. Because of the hopelessness of the situation, and he had learned that Mr. Hays, another one of the directors, was anxious to withdraw because as he aptly put it at the time he didn't want to go to the funeral; and they said at the time if they could find some one—

The Referee: Who was this other one?

The Witness: Hays.

Mr. Kahn: Hays.

The Witness: William Henry Hays.

Mr. Kahn: He is a member of the New York Stock Exchange and was a director at the time.

The Witness: Yes.

[fol. 138] A. (Continuing) If we could find some one who would make an offer for the stock they would be glad to get out.

I think I spoke to Fribourg about it and asked him if he was interested in making an offer, and I think as a result of that this offer was made.

Q. What did Fribourg say to the best of your present recollection?

A. I think he said at a price that he would be willing to.

Q. Did you discuss that price with him?

A. No.

Q. Did you discuss it with Kelly or Hays?

A. I think I did after we received the offer or some inkling as to what the offer was going to be.

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Pages 306-307

Q. I show you this letter which is Objectant's Exhibit 15 and ask you whether you saw that letter before it went out?

A. Yes.

Q. How long before it went out did you see that or a draft of it?

A. Maybe a week.

Q. Did Kelly consult you with respect to the composition of the letter?

A. Yes. As a matter of fact, he asked me for some of the figures.

Q. Did you have any part in the composition of the letter, other than to supply figures?

A. No.

Q. The letter, as I understand it, is composed entirely by Mr. Kelly except that you supplied the figures?

A. Mr. Kelly writes his own letters always.

Q. I am asking you about this letter. Did Mr. Kelly write this letter?

A. One hundred per cent.

Q. Did you make any suggestions about the context of his letter?

A. No.

[fol. 139] Q. At the time Mr. Kelly showed you a draft of his letter did he at the same time show you Mr. Winter's letter?

A. Yes.

Q. Was that the first time you had ever seen Mr. Winter's letter?

A. I think we discussed it before. I think Mr. Kelly composed the Winter offer.

Q. I am asking you when you first saw it. When did you first see what Mr. Kelly composed?

A. He showed it to me.

Q. So your testimony is that Mr. Kelly composed both of these letters?

A. That is correct.

Q. And you had no interest in it, except in supplying the figures?

A. That is right.

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Pages 310-311

Q. And then beginning in 1933 you began to prepare this report, did you not?

A. As long as the corporation had funds they engaged a public accountant; after they ceased having funds I had to do it.

Q. So that you prepared this in pursuance to the indenture?

A. Yes, I think I did.

Q. It is signed by you?

A. Yes, I did prepare it.

Q. Did you after you became an officer of the company file with the Manufacturers Trust Company any further or other financial report other than the statement of the income and disbursements?

A. We continued to supply the Manufacturers Trust Company with exactly what they had always received.

Q. Which was?

A. A statement of the receipts and disbursements.

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[fol. 140] EXTRACTS FROM TESTIMONY OF WALTER A.  
FRIBOURG

Pages 97-98

By Mr. Hanlon:

Q. Were either of the Messrs. Becker connected with you in that business?

A. No.

Q. Neither Norman Becker nor Sanford Becker?

A. No.

Q. Were they connected with you in the textile business?

A. No, sir.

Q. Were they ever connected with you prior to your retirement in any business?

A. No, sir.

Q. Let me put it this way: Did they have any investments in any business that you were interested in?

A. No, sir.

Q. Or hold any securities?

A. No, sir.

Q. Subsequent to the time of your retirement what did you do?

A. I took care of my own investments.

Q. What was the nature of those investments?

A. Mortgages, stocks and bonds.

Q. And where was your office, if any, for that purpose?

A. My home.

Q. In Pelham?

A. That is right.

Q. Do I understand that at no time, neither before nor after your retirement, you had never been connected with the Beckers; and I include in that any reference to the debtor's affairs?

A. No, never—never been in business.

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Pages 103-105

Q. What were the circumstances under which you went to see the apartments?

A. Mr. Becker told me about it.

Q. Which Mr. Becker?

A. Mr. Sanford Becker.

[fol. 141] Q. What was it he told you?

A. I think that he told me that he had bought a certificate or something on Calton Court or Calton Crescent; and I thought I would go and look at it. That is my recollection. I can't recollect.

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Q. You were telling us that Mr. Becker, Mr. Sanford Becker, told you that he had bought some certificates or something?

A. That he had some or something.

Q. Or had some?

A. He told me about a building up in New Rochelle.

Q. Did he ask you to do anything in connection with that building?

A. No.

Q. Did he make any suggestion that you yourself should purchase some certificates?

A. No, no.

Q. Am I to understand from your testimony that your purpose in going up at that time to look at the building, to inspect the building from the inside, was because Mr. Becker had told you he had taken an interest in it and you wanted to look at the building then yourself?

A. That is correct.

Q. Having in mind that possibly, if it looked good enough, you would go into it yourself?

A. Possibly.

Q. Do you have now any substantial investments in securities of apartment houses?

A. I don't know what you mean.

Q. You have made it a practice to own apartment house securities?

A. I have had, yes.

Q. During the period that we were speaking about did you own any substantial amount of apartment house securities?

A. Yes.

Q. Was it your practice before you owned these to make an investigation?

A. Yes.

Q. And then if it looked like a desirable investment you would purchase some securities in it?

A. That is it.

[fol. 142] Q. And that is the procedure you followed in connection with the Calton Court?

A. That is right.

And I also have a number of people calling me up to buy things, I mean certificates on real estate and that sort of thing.

Q. You mean to buy them from you?

A. No; to sell them.

Q. To sell them to them?

A. Yes, that is it.

Q. Knowing that you were interested in such things?

A. That I would buy them.

Q. But it was Mr. Becker who told you about this particular property?

A. Yes.

Q. Do you remember when it was that you first purchased any securities of the debtor? By the "debtor" you know I mean the Calton Crescent, Incorporated?

A. Yes.

I think it was in the fall of 1941.

Q. About the time that you went out to look at the property?

A. I think I had looked at the property before, passing there. It may have been around that time.

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Pages 115-116

Q. So that by January, or, rather, February, 1943 you had purchased \$12,000 of the principal amount of debentures and the accompanying stock?

A. That is right.

Q. Do you recollect what were the reasons why you made these additional purchases during that year from '42 to '43?

A. I was buying other things.

Q. No. We are talking about Calton Crescent.

A. Well, I bought it on a speculation.

Q. Did you have any additional information from Mr. Sanford Becker or Mr. Norman Becker?

A. In 1943?

[fol. 143] Q. Leading up to the purchases which by 1943 had aggregated \$12,000 in principal amount of debentures?

A. No, I had no special information.

Q. Well, Mr. Fribourg, you had some reason for buying these additional shares or debentures, didn't you?

A. I told you: speculation.

Q. You want us to understand that there was no particular information that came your way from either of the Mr. Beckers?

A. Absolutely not.

Q. Let me ask you this, then, Mr. Fribourg: Isn't it a fact that this speculation, as you call it, was induced by your belief that this was potentially valuable property?

A. I told you, Mr. —

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A. I told you I thought it was a pretty good proposition because I was predicating it on the fact that four hundred and some odd thousand dollars was the assessed valuation; and somebody told me—I suppose it was Mr. Becker told me—that the taxes were so tremendous on the property and that brought out the assessed valuation; and when I heard that the assessed valuation was four hundred thousand or something like that—and, of course, the natural thing for me to say was, "Didn't they try to have it reduced?"—I don't know what the answer was now, but it wasn't reduced. If it wasn't reduced and it was still \$400,000, there must have been some value there.

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Pages 151-152

Q. To what extent were you familiar with the fact that those offers or inquiries were being made?

A. I was not familiar with it at all.

Q. Is it your testimony, Mr. Fribourg, that at no time did either of the Mrs. Beckers tell you that inquiries or [fol. 144] offers were ever received with respect to this property?

A. Did they tell me?

Q. Yes.

A. No.

Q. You never had any conversation—

A. Well, now, listen here. I won't say that they didn't tell me about it. There may have been times where they said somebody was in on it, but there is still nothing—it is not in my mind that anything was said about the sale of it.

Q. So you have no personal recollection of having been informed on any particular occasion of any prior offer?

A. No, out of that two hundred and fifty thousand.

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Q. When did you first hear of the contract on the sale of the property which ultimately was consummated, that is, the sale for \$300,000?

A. It was some time prior to January 1st.

Q. Of what year?

A. Nineteen forty-six.

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Pages 153-154

Q. And after that you think the question of your becoming a director did not come up?

A. No, sir; I think I said I did not want to be.

Q. Were you ever requested by either of the Messrs. Becker to become a director?

A. No, sir.

Q. Or an officer?

A. I don't think so.

Q. Was there ever any conversation between you and the Messrs. Becker in which, in words or substance, it was suggested that you not become an officer?

A. No, sir.

Q. With a view to your purchase of securities that it would be better that you not become an officer or director?

A. No.

Q. Did you ever consult counsel, a lawyer, with respect to that matter?

A. No, sir.

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[fol. 145] Pages 157-160

Q. Now, did you ever have anything to do with operating or managing the Calton Crescent property up in New Rochelle?

A. No, sir.

Q. Did you ever have any contact with the managing agents of that property throughout the years that you owned securities of Calton Crescent?

A. No, sir.

Q. Did you ever go to these managing agents or have them come to you?

A. No, sir.

Q. (Continuing:) And discuss the operating conditions of the property?

A. No, sir.

Q. At the time that you were purchasing these Calton Crescent debentures were you also purchasing stocks or bonds of any other real estate companies?

A. Yes, sir.

Q. (Continuing:) That were for sale?

A. Yes, sir.

Q. And did you buy these other securities through one or many brokers?

A. Numerous—I don't know.

Q. And in connection with these purchases that you made of securities, now, other than Calton, do you recall whether the brokers would call you from time to time to make offers of securities?

A. I didn't get that, sir.

Q. Do you recall whether different brokerage houses would call you on the telephone from time to time and offer you different issues that they had for sale?

A. Well, they would either write or telephone, and if I wasn't there then I may call them back and leave messages.

Q. Did you receive many calls from brokers?

A. Oh, yes.

Q. During these years?

A. Oh, yes.

Q. Offering securities of other issues?

A. That is right.

Q. And did you buy and sell other issues?

A. Oh, yes.

[fol. 146] Q. Now, taking up the first purchase that you made of two thousand of certificates through Goldwater & Company, what is your best recollection now as to whether prior to the time that you bought these \$2,000 of securities from Goldwater you had ever had any dealings with that firm before?

A. I didn't quite get your question.

Q. What is your best recollection as to—

A. (Interrupting:) That I had done business with them before!

Q. That you had or had not done any business with them before?

A. I don't know. I think I did do business with them before; I think that they—I can't remember; I think they sold me some of that Brooklyn property.

Q. Some bonds?

A. Well, their certificates; they don't call them bonds.

Q. They are brokers of certificated mortgages?

A. That is right.

Q. Is Goldwater & Company what is known as an over-the-counter house?

A. Yes, I think they are an over-the-counter house. They are well known, I think.

Q. And prior to the time that they offered you these bonds of the Calton Crescent they had from time to time called you and offered you other securities, some of which you had bought?

A. I think so.

Q. Let us take Reiley & Company: What is your best recollection as to whether that firm had offered or sold you securities other than Calton Crescent securities prior to August—prior to July of 1942?

A. I can't remember whether they did or didn't, sir; I don't know, I can't remember.

[fol. 147] Q. Do you remember whether you approached Reiley & Company and asked them to pick up such securities for you?

A. I don't think I did; I don't—I can't remember. One of their salesmen may have been with another house or—They are always looking for business.

Q. Now, take the firm of Shaskan & Company. You know, do you not, Mr. Fribourg, that that is a very large and well known stock exchange firm?

A. I know them just as I know all of the rest of them. I don't know their status.

Q. What is your best or present recollection as to whether you had had offers of other securities through Shaskan & Company before you bought this \$1,500 security?

A. I may have done business with them because there are quite a few certificates—I never bought unless I knew the property, I wanted to see it; because you don't buy a cat in the bag, you must know the property before you buy it.

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Q. Now, according to your testimony in response to Mr. Kahn's questions, in September of 1943 you were called upon by the Beckers to contribute one-third of the then due taxes amounting to some \$3,600. Do you recollect so testifying?

A. That is right.

Q. And your third therefore would have been \$1,200?

A. That is right.

Q. Was any statement made to you as to who would contribute the remaining two-thirds?

[fol. 148] A. No, none was made; but I surmised how the other two-thirds would—(interrupted).

Q. There was no discussion about that?

A. No, sir.

Q. Was there ever any discussion with the Messrs. Becker as to the manner in which you may expect to be repaid?

A. Yes.

Q. What representation was made to you?

A. We expected the next time there was any increase, any increase in revenues, I will get it back right away.

Q. Did you inquire of either of these gentlemen as to what the operations of the building were showing?

A. Yes. I knew it was at a loss. But you must get your taxes back right away because then you make somebody else wait and you pay your taxes.

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Pages 181-182

Q. Was there any inducement made to you for putting up the \$1,200?

A. No, I do not think so.

Q. Was any statement made at that time with respect to the offers which had been received on the property or inquiries made from time to time?

A. No, sir.

Q. Mr. Fribourg, do you mean that neither Mr. Sanford Becker nor Mr. Norman Becker told you that the property might well be sold for a substantial amount?

A. No.

Q. And that offers were being received from time to time?

A. No, I knew nothing about offers.

Q. You knew nothing about offers?

A. Nineteen forty-three you are talking about?

[fol. 149] Q. In September, 1943 when you made the first advance for taxes?

A. No.

Q. Was there any statement with respect to the possible sales value of this property made to you at that time to induce you to advance that money?

A. No. What induced me to give the money was the fact that it had to be given, they had to have it; and that the

next month or the month thereafter we would get it back immediately from rentals, and that the tax money was—What do you call it? It had a pre—it had—

Mr. Kahn: A prior lien!

A. (Continuing:) A prior lien on it and you could get your money back because of the prior lien.

Q. That is why you could get your money back?

A. That is what I was told and that is what I knew.

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[fol. 150] EXTRACTS FROM TESTIMONY OF E. HENRY SONDHEIMER

By Mr. Kahn:

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Pages 241-242

Q. Mr. Sondheimer, I assume from your testimony here today you have been in this securities business a good many years?

A. Yes, sir.

Q. And dealt in a good many real estate issues?

A. Yes, sir.

Q. And other unlisted securities?

A. Yes, sir.

Q. In addition to having obtained some of Calton Crescent bonds from the individuals whose names you have given here and whom you described as individuals—

A. Yes.

Q. (Continuing:) You purchased, according to the notes I took here, a much greater number of these bonds through Stock Exchange firms and through dealers?

A. Correct, sir.

Q. Can you tell us how or in what manner you had contacts or obtained contacts with these other Stock Exchange firms and dealers?

A. On every deal, sir, there is what is known as the National Quotation Service, of which I am a member—I pay by the year—, which publishes every day what we call the quotation sheets. It is a normal procedure in the business. You have an interest in an issue, you think somebody might buy a certain bond or a certain stock, and you appear in [fol. 151] that quotation service looking for offers; or, if

you have bonds to sell, you are offering securities. And they make up a monthly summary and a semi-annual and an annual summary; and any broker in the normal course of events gets into a situation that he is unfamiliar with. Those are the securities lists.

Q. Did your name and the name of your firm appear on these quotation sheets?

A. Oh, sure.

Q. As being interested in the Calton Crescent bonds?

A. Yes, sir.

Q. Did that bring to you from time to time offers from Stock Exchange firms and other houses that were dealers in them?

A. Definitely, sir.

Q. The letter and the card that you sent out, which you sent out, which have been offered in evidence here, did you submit those before you sent them out to Mr. Fribourg or to anybody else?

A. No.

Q. On these sheets, Mr. Sondheimer, which you mentioned a moment ago, were there any other dealers mentioned from time to time as having any interest in Calton Crescent bonds?

A. Definitely, sir.

Q. You were by no means the only one?

A. No, sir.

Mr. Kahn: I have no further questions.

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EXTRACTS FROM TESTIMONY OF MYLES B. AMEND

Pages 278-279

By Mr. Kahn:

Q. Now, would it refresh your recollection if I read you this statement:

"At no time in the last several years have the income debentures of Calton Crescent, Incorporated been [fol. 152] selling at more than eight per cent of the face value and the stock has had no market whatever apart from the income debentures."

Do you recall that?

A. I still don't recall it, but I think it was true. I mean I don't recall saying it.

Pages 280-282

Q. Is that the fact?

A. I now have no recollection that it is the fact. Apparently I said it then and I must have known at the time that it was a fact. I don't recall today.

Q. Now, do you recall making this statement in that affidavit, Mr. Amend (reading):

"As pointed out in the affidavit of Richard Kelly, sworn to on January 29, 1942, the inability of the defendant (that is, the Calton Crescent) to complete the proposed sale would undoubtedly result in the foreclosure of the first mortgage on its property and the loss of whatever equity may revert to the holders of the debentures and its stock."

A. I don't recall making that statement, no.

Q. In view of the fact that it appears in this affidavit—

A. (Interrupting:) I don't deny it.

Q. May we assume that before making that statement in your affidavit you verified the correctness of it?

A. Surely.

Q. Now independently of the affidavit, Mr. Amend, is it the fact that at that time that you were proposing to accept this offer of the \$220,000 the corporation was in arrears on taxes, interest on the first mortgage?

A. That is my recollection, and other creditors.

[fol. 153] Q. And other creditors?

A. And other creditors.

Q. Including obligations to your own firm that had not been paid?

A. I was not thinking of those; I was thinking of operating expenses.

Q. And operating expenses?

A. Yes.

Q. And the plight of the company was certainly serious?

Mr. Hanlon: I object to that question.

(Pending question was read by the reporter.)

The Referee: He may answer.

A. I certainly thought it was then.

Q. Now, did you oppose or did you support, Mr. Amend, as a director the borrowing of this \$15,000 from Baset?

A. I think I supported it.

Q. Is there any doubt in your mind, Mr. Amend, both as an attorney and also as a former director of this company that the borrowing of this money, \$15,000, from Baset by Calton Crescent was a very constructive thing for the Calton Crescent.

A. Well, it was certainly a more constructive step than selling the property at the price then offered would have been in the light of subsequent developments.

Page 283

Q. Do you recall after some discussions with the King Estate that you reported back to the board that the most that they would loan was \$10,000 and that that would not be enough?

A. I don't recall it, but it may very well be.

Q. The fact of the matter is that the \$10,000 would not have been enough?

A. I don't recall it, either; but presumably it wasn't or [fol. 154] we would not have been so anxious to get fifteen.

Q. Now, this mortgage which was placed for fifteen, Mr. Amend, and which you handled as legal representative to Calton, was there any bonus of any kind charged for that?

A. I don't recall it, but I don't think so.

#### EXTRACTS FROM TESTIMONY OF NORMAN S. BECKER

Pages 346-348

By Mr. Hanlon:

Q. What records was your brother referring to?

A. To the monthly statements, the same thing. The method of procedure was in 1942 the Westchester Trustees

issued monthly statements showing the cash receipts and disbursements. When the assignment of rents was given in 1943 the statements were issued in the same form, except they were headed up "Baset Realty" instead of "Calton Crescent, Inc.", so that this statement here shows the last three months of the same statement.

Q. So, in other words, there was really only one set of records?

A. There were two sets of records, one for Calton and one was for Baset.

Q. When they speak here of monthly reports that covers all of the records referred to in that paragraph?

A. That is right.

Q. After the Baset Realty loan was made you became a director and officer of the debtor. Did you continue to interest yourself in finding prospective purchasers for the property? I am referring, of course, to the apartment house.

A. At that time, yes.

Q. Did you receive any offers or inquiries from others with respect to the purchase of the property?

[fol. 155] A. I received inquiries asking for figures about the building, but no offers.

Q. Would you be able to estimate the frequency with which those inquiries were received?

A. Well, different brokers would call up and ask for different figures.

Q. What sort of figures?

A. They would want to know what the operating charges were, what the rents were, what the mortgages were, and what was due on conditional bills of sale, and the amount of taxes.

Q. How frequently were those inquiries received, if you can estimate?

A. It is hard to estimate.

Q. With a fair degree of frequency?

A. I would say ever so often and then a broker would hear about it from somebody else and ask for the figures.

Q. He contacted you?

A. He contacted me or Mr. Kelly, or Mr. Kelly asked him to contact me.

Q. These inquiries in one fashion or another were handled by you?

A. Mr. Kelly in most of the times referred them to me.

Q. So that ultimately you handled them?

A. Ultimately I had to give them the figures.

Q. Now, did you get any offers after April, 1942, as distinguished from inquiries?

A. No.

Q. No offers whatever?

A. Not then, no.

Q. From that time on project yourself right to the time that the property was sold. Will you tell me what offers, if any, were received?

A. I think the first semblance of an offer was from a fellow by the name of Rubin.

Q. Do you remember how much that offer was?

A. It purported to be about \$250,000, if I remember.

Q. Tell me why are you putting it that way, saying "it purported to be"?

[fol. 156] A. From the type of broker who made the offer. I personally had no confidence in it whatsoever.

Q. Was that offer made on account of—at least purportedly on account of—one Solomon Solomon?

A. I think the name sounds familiar, because I tried to check him up to find out who he was and could not get any information from anybody.

Q. This Rubin was a broker?

A. He was a broker.

Q. And he purported to bring in an offer of \$250,000?

A. Yes.

I never met the man, though.

Page 350.

Q. Was that the inquiry or offer, or whatever it — have been, for \$280,000?

A. It was an inquiry; it never crystallized into an offer.

Q. But it was turned down, in any event?

A. The inquiry was turned down. It was made in the form of an inquiry, "Would you take \$280,000?"

Q. And the debtor answered no in substance?

A. Yes. I think I was the party that said the stockholders would have to vote on any proposition that would have to be made, so I would not be in a position to tell him any price; it would be a question of submitting a firm offer with a deposit and then submitting it to the stockholders.

Q. Did you say anything to the broker in question about getting a minimum offer of \$300,000?

A. I told him that I thought \$300,000 should be the price, yes.

Page 351

Q. Did you receive another offer over and above, or, rather, as distinguished from the one we have just been talking about of \$280,000 or \$290,000?

A. No, I don't think so.

[fol. 157] Q. Did you receive an inquiry—

A. No, I don't think so.

Pages 354-355

Q. What conversation did you have with Mr. Kelly with respect to this?

A. Mr. Kelly said he prepared a letter of an offer which was to go out and he wanted to prepare an accompanying letter with it because he felt that the time to get out of the Calton as far as he was concerned was the present time, and that he was not interested in selling his stock unless all of the stockholders were offered the same proposition that was being submitted by this letter here; and he said that he personally would be very happy if every stockholder would do it and would get out and would be able to wind up the whole Calton thing and make a finish of it.

Q. Let me ask you this before you go any further with the conversation: Had you heard anything about a proposal to buy the debentures and stock at three per cent of the par value of the bonds?

A. Yes.

Q. Prior to the time that you went down to Mr. Kelly's office?

A. He spoke to me about it when he was up at the annual meeting.

Mr. Kahn: Who spoke to you?

The Witness: Mr. Kelly had spoken to me at the annual meeting and he had seen the yearly figures for '43. He was very disgusted.

Q. What did he say?

A. He said the property never earned a dollar since it was built and it would never earn a dollar until it fell down, and that was his honest conviction, and there had to be a finish to it at some time and now was as good a time as any to finish it.

[fol. 158] Q. When was that discussion, do you recall?

A. In February I think. All of the annual meetings were made then.

• • • • •  
Pages 356-357

Q. I note from the minutes of the meeting that Mr. Fribourg is listed as having been present at this annual meeting on February 15, 1944. Would it then be your best recollection that you had a talk with him then?

A. I think I had a talk with him then and I think Mr. Kelly had a talk with him then.

Q. Were all three of you talking together?

A. Yes; and I think somebody else was there, I am not sure whether Mr. Hays was there or not or Mr. Clay. I know three or four people were there. Keeler might have been there, too.

Q. At the conversation to which you refer what was said in substance?

A. I mean they were all fairly well disgusted.

Q. I don't want you to say that.

Mr. Hanlon: I move to strike that out, your Honor.

Mr. Kahn: What was said.

Q. (Continuing) What was said? Not how they felt.

A. I don't know how to tell you that then. I mean I could tell you what the gist of it was.

Q. Give me the gist of what was said.

A. The gist of it was that Fribourg said, "I am not going to sell any securities. I gambled with that and I am going to keep them"; and Mr. Kelly and the others who were there said, "If you can find somebody or if you are the only one that wants to gamble, you can have them". That is the gist of it; just the actual words I couldn't tell.

[fol. 159] Pages 358-359.

Q. Didn't you go to the Corn Exchange Bank, Grand Central branch, with Mr. Winter in connection with opening an account?

A. I don't even know the manager of the Corn Exchange Grand Central branch bank.

Q. You heard Mr. Winter testify here this afternoon that you went there with him and opened the account and furnished the money?

A. Yes.

Q. Is it your testimony that that event never occurred?

A. Positively not, and positively it was not my money.

The Referee: What?

The Witness: And positively it was not my money.

Q. Regardless of whose money it was, Mr. Becker, did you put the money in, whether it was your money or somebody else's money, as testified to by Mr. Winter?

A. No, I didn't.

Q. You never went with Mr. Winter to that bank?

A. No.

The Referee: And you say the money that went into that account was not your money?

The Witness: Absolutely not.

Q. Do you know whose money it was?

A. It was Fribourg's bank, so I imagine it was from Fribourg.

Page 360

Q. We were talking a while back about a conversation with Mr. Kelly at his office at 233 Broadway on the day he showed you the draft of the Winter letter, Objectant's Exhibit 14. Will you go on with that conversation? You [fol. 160] started to tell me what happened and I interrupted you to go back.

A. Well, I mean I can tell you what the gist of it is.

Q. That is all I want.

A. As I remember, the gist of the conversation was he thought it was a good idea to make the offer as he wanted all of the securityholders to have it. He did not want to sell unless the same offer was made to every securityholder;

he even went farther and said, "If Winter wants to buy, we have no money. Winter will have to pay to have these letters mimeographed and sent out". But I thought it would be perfectly proper that we send the letters out for him.

The Referee: Who is this; Kelly?

The Witness: Yes.

Page 365

Q. So there will be no misunderstanding about my question, did you, outside of that one instance, use the records of the company—whether it is the stock records or other records—to circularize the stockholders or permit other people to circularize them with respect to the sale of securities?

A. No.

Pages 366-369

Q. In your affidavit which you verified on June 8, 1946 in this particular proceeding—this affidavit was made in opposition to motions by the Manufacturers Trust Company and the Securities and Exchange Commission—you said (reading):

"I should further call to the Court's attention that the annual reports were mailed to the stockholders from [fol. 161] time to time up to and including the year 1945, apprising them of the sound position of the debtor's finances."

What was the form of these annual reports?

A. Usually the president's report or a copy of the report that was sent to the Manufacturers Trust Company each year.

Q. Do you have any of those reports in court with you?

A. No, no. I think they are in the minute book. What was sent out is usually in the minute book.

Q. Will you show me the last one which was sent out? We will start with that.

A. Well, I see here in February, if you want me to read from this here (indicating).

Q. Just show it to me. February of what year is this?

A. This seems to be February of 1944, which was sent out.

Q. You are indicating a letter?

A. Which Mr. Kelly sent, yes, in which he described the condition of the company; and I imagine that was the last one then from what it says here.

Q. May I just see that, please, Mr. Becker?

A. I imagine so; I don't know.

Mr. Hanlon: The witness has indicated a communication dated January 26, 1944 addressed to the stockholders of the debtor, signed by himself as secretary, to which is appended a long communication signed by Mr. Kelly as president.

The Witness: Yes.

Q. I understand, Mr. Becker, as far as you know this was the last report that was sent to the stockholders?

A. I mean without going through more carefully it seems to be.

[fol. 162] The Referee: What is the date?

Mr. Hanlon: That is January, 1944.

The Witness: January 26, 1944.

Mr. Hanlon: May I ask, your Honor, whether Mr. Kahn has any later report?

Mr. Kahn: I don't know.

(Further informal discussion ensued.)

Q. Subject to correction if you find out otherwise, Mr. Becker, then may we take it that this report dated January 26, 1944, this communication, is the last sent to the stockholders in the nature of a report?

A. I mean from the language of this here it seems to be from what Kelly says here, it seems that there weren't any sent out after that.

Mr. Hanlon: Then subject to correction—because the witness is doing the best he can—I offer this in evidence. The witness has stated that as far as he knows that is the last communication in the way of a report.

The Witness: That is January 26, 1944.

The Referee: All right.

(The same is received in evidence and marked "Objectant's Exhibit 29" of this date.)

Q. Now, in the first paragraph of Mr. Kelly's part of this communication he says (reading):

"Your personal attendance is urged, especially since the company has no funds available to forward and send to stockholders the earnings statement and balance sheet as has been done in previous years."

[fol. 163] Do you have any of the earnings statements and balance sheets to which Mr. Kelly refers as having been sent to stockholders in the previous years?

A. They should be in the book here.

Q. Will you look, for example, and find the one that would have been sent out in 1943?

A. I think this should be the one (indicating); yes, this looks like a mimeographed affair; it is a report and that is the statement of income and that is the balance sheet. I think this should be the one.

Q. Is this which you are indicating to me the form of reports which were sent out prior to 1944?

A. I imagine so—I imagine so.

Mr. Hanlon: I will offer that in evidence.

The Referee: What is it; the one for '43?

Mr. Hanlon: That was the report sent in 1943 to the stockholders covering the '42 figures.

Mr. Kahn: I have no objection.

Mr. Hanlon: Please mark them as one exhibit.

(The same are received in evidence and marked, "Objectant's Exhibit 30(3)" of this date.)

Pages 375-376

By Mr. Kahn:

Q. And did you talk to him when the management of that company was turned over to this servicing organization known as the Westchester Trustees?

A. That is right.

Q. When did that happen?

A. That happened in April, 1942.

Q. That was still before your connection with the company?

A. That is right. The loan had been approved and the [fol. 164] management had been changed, and that was

changed by the former directors and officers before we became officers and directors.

Q. Now, the Westchester Trustees, can you tell us something about them; who were they?

A. They were a servicing outfit in White Plains, who had been taking care of properties for the court and the rehabilitation of all the certificated properties in Westchester, and they had a very good standing in Westchester, very reliable; and Mr. Amend and Mr. Kelly knew some of the trustees, and they were very much inclined to give them the management of the property because they thought it would be in good hands.

Q. And they proceeded to do so?

A. They did.

Q. Now, they remained in control of the property until the Baset mortgage was put on?

A. That is correct.

Q. After the Baset mortgage was put on were they still permitted to maintain the same management?

A. That happened simultaneously.

Q. There was no change made because the Baset mortgage went on?

A. No.

Page 377

Q. Was the compensation charged by the Westchester Trustees less than Mr. Keeler had been charging?

A. Yes.

Q. Substantially?

A. I think all of their management charge was \$120 a month for taking care of the property.

Q. They attended to the renting, did they?

A. They attended to the renting.

Q. And to hiring the help?

A. Hiring the help.

Q. And making all repairs?

A. And making all repairs and stalling off all of the creditors. Their reputation carried them along.

[fol. 165] Pages 378-380

Q. As I understand the situation, you made no change in the picture after the rent assignment was given to the Baset?

A. There was no change made at all. There was only a change made in the name of their bank account at the County Trust Company in White Plains from the Calton Crescent to the Baset Realty; that was the only change made.

Q. When they paid out moneys by way of expenses in the operation of the property they made these payments through their own checks?

A. No; they sent the checks down to New York and Mr. Kelly signed the checks jointly with myself I believe or my brother. There were two signatures required on every check.

Q. But they would draw them?

A. They drew every check and sent the vouchers down with the original bills. That is how I happened to see Mr. Kelly so often.

The Referee: You or Kelly signed?

The Witness: Jointly. There were two signatures necessary.

Q. You say you went up to this property twice a week?

A. That is right.

Q. From the time that the Westchester Trustees were employed?

A. That is right.

Q. And were you satisfied that they were doing an efficient and competent job?

A. They were doing a very good job.

Q. Better than Keeler had done?

A. Absolutely.

Q. In addition to sending these annual reports to the Manufacturers Trust Company, Mr. Becker, do you recall whether or not in the year 1945 there was any talk that you had with Mr. Gage, the vice-president of that bank [fol. 166] about having the Trust Company make a personal inspection of the property?

A. I believe it was in '44.

Q. Forty-four?

A. That he wanted to make an inspection of the property

Or, it might have been right up to the rent assignment; I am not sure.

Q. What was the talk you had with him about?

A. He asked me if I would send them a letter so that their representative, a party by the name of Reider or Reidell—I have just forgotten the name—he wanted to send them up to look at the property to be satisfied that everything was all right; and he said he had a friend or knew of a broker in New Rochelle that he wanted us to co-operate with and furnish all particulars, that this broker thought that he might be able to sell this property.

Q. What did you do about that request?

A. I instructed the representative myself to go there, and he did go there and he made an inspection of the entire property; and the broker called me up a number of times and I gave him full information with the number of leases and the dates of the expirations and the expenses—something which we did not want to give to anybody because they were, perhaps, higher than they should have been—but we co-operated fully in giving him all of the information that they requested.

Q. Did this broker ever produce an offer?

A. Never.

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Pages 381-385

Q. Mr. Becker, did you have anything to do with the acquisition of this block of bonds—I think it was \$37,500—from Reynolds, Richards & McCutcheon, counsel for the King Estate?

A. Yes.

Q. Will you tell us what your participation was?

A. I had innumerable talks with Mr. Minor.

[fol. 167] Q. Mr. Minor, who is he? You have not identified him.

A. Minor is one of the partners of Reynolds, Richards & McCutcheon.

Q. That is a very large law firm, is it not, in New York?

A. Yes, I believe it is.

Q. Established for a long time in New York?

A. Yes.

Q. These counsel had been the counsel for the King Estate?

A. That is right.

Q. And the King Estate was one of the largest holders?  
A. The largest individual holder.

Q. Was there any approach made by either Mr. Minor or Mr. McCutcheon to you with regard to a sale of the holdings of the King Estate?

A. Oh, I believe it was in the end of '43 or the beginning of '44 when one of the trustees of the King Estate, which Mr. Kelly had represented, had died or was interned in France, as Mr. Kelly told me about it; and when they appointed a trustee for the King Estate it was at that time that they decided that they would like to sell their bonds.

The Referee: Did they approach you in the first instance?

The Witness: Yes, they did.

The Referee: Or did you approach them?

The Witness: No; they approached me.

Q. You are positive of that?

A. Positive.

Q. Who was it first approached you?

A. Mr. Minor.

Q. Had Mr. Minor any familiarity with the affairs of the Calton Crescent at the time of this original approach to you?

A. Yes, he did.

The Referee: You say he had been at stockholders' meetings?

[fol. 168] The Witness: Yes.

The Referee: With a proxy?

The Witness: Yes, because they never gave anybody else a proxy except Mr. Minor.

In addition to that about every three months he used to write or call and ask me if I would not please send him the operating statements or a recap of the operating statements for the first three months of 1943 or the last six months of 1943, or something like that. So he got the figures continually as he requested them.

Q. Let's come back to this initial discussion that he had with you. Tell us about when that was and also what was said by you and by him.

A. I imagine it was in the spring.

**The Referee: What?**

**The Witness:** I imagine it was in the spring of '44 when he told me that the trustees had decided that they would like to sell their bonds, that they didn't feel there was any more hope to the situation, and asked if I knew of anybody who wanted to buy the bonds. So I told him I didn't know off-hand, but I would approach some of the other stock-holders if he wanted me to and find out.

But it was also a question of what he wanted for his bonds. So he said, well, in 1942 they had an idea that if the original sale at \$230,000 had gone through the bonds might have paid between eight and ten, but if they got ten, now they would be very happy to get it, and if I could get them a purchaser at the rate of ten they would do it.

So, as I recall it, I told them if they would please take it up with Mr. King first and send me a letter authorizing [fol. 169] me to offer those bonds at that price, good for thirty days, that I would do it; and he did.

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**Q.** With whom did you take up the matter of purchasing these bonds?

**A.** Well, I took it up with Mr. Fribourg and I took it up—

**The Referee: With who?**

**The Witness:** With Fribourg.

**A. (Continuing)** And I took it up with my mother who had had some bonds there and with my sister-in-law; and I told her that I would not buy them myself, but that these bonds were offered at ten, if she wanted to take a gamble I thought it was up to her; and she said she would speak to Sanford about it, and she subsequently bought them.

**Q.** I assume Sanford finally talked to you about the matter, didn't he?

**A.** Yes, he spoke to me about it.

Pages 386-387

**Q.** After your brother had indicated that his wife and your mother would accept this offer of ten, who communicated that fact to Mr. Minor?

**A.** I did, I spoke to him.

Q. Yes?

A. And I told him when he got the bonds ready he should call me, and he said he would let me know or drop me a few lines and let me know; but that the one thing they wanted was the bank treasurer's check—it did not necessarily have to be certified; they preferred to have a bank check for these things—, and they would have them all fixed up and he would let me know in due time.

[fol. 170] Q. Do you know whether a payment was made in that fashion?

A. That is correct.

Q. Through a bank check?

A. That is right. I personally delivered it.

Q. And then the bank on receipt of the check delivered the bonds?

A. That is right.

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Pages 389-398

Q. Mr. Becker, when you were last on the stand I was interrogating you about the negotiations with Mr. Minor of Reynolds, Richards & McCutcheon. Before he made the offer to sell the bonds of the King Estate, Mr. Becker, had you met him at various meetings of the debtor corporation?

A. My recollection is that he was present, that he attended every annual stockholders' meeting.

Q. And in between these stockholders' meetings do you recall many occasions when he requested information concerning the rental condition of the property and the expenses of the property?

A. About every second month he either called or communicated in writing with me and asked for the position of the company as far as indebtedness and gross receipts and the general operating conditions.

Q. And did you furnish him that information?

A. In each and every case.

Q. Now, did that situation continue up to the time that he made this proposal to sell the block of bonds owned by the King Estate?

A. Yes, it did.

Q. Now, there was another block of bonds purchased by the Y.W.C.A., the Young Women's Christian Association.

Have you any familiarity at all with the negotiation that resulted in that purchase?

A. Yes, I do.

Q. Did you have anything to do with it?

A. I did.

[fol. 171] Q. With whom did you conduct that negotiation?

A. With Mr. Clay who was a director of the company.

Q. What connection did he have with the Young Women's Christian Association?

A. He was on the committee, on the investment committee of the Y.W.C.A.; he handled most of their real estate.

Q. Did he attend many or practically all of the stockholders' meetings of the debtor?

A. Practically all while he was well. There was one period of time there while he was ill, but outside of that he even when he was ill requested copies of minutes and he was furnished them.

Q. Now, do you recall the first approach that was made in connection with the sale of this block of bonds owned by the Young Women's Christian Association?

A. My nearest recollection is that he called me on the 'phone and he said that they had decided to sell their bonds, that if I would be able to find a purchaser for them that they would like to sell very much; and he felt that they should get ten per cent for them and he said, "Take as much time as you want. When you find somebody that will pay ten for them, call me and we will arrange to sell them."

Q. Was that after the purchase had been made from the King Estate?

A. It was about the same time; I don't know whether it was before or after.

Q. Do you recall now, Mr. Becker, whether in his discussions with you Mr. Clay made any reference to the sale by the King Estate?

A. Well, he knew that the King Estate had either sold or had wanted to sell.

The Referee: How do you know he did?

The Witness: Because he had told me at the time.

[fol. 172] Q. What did he tell you?

A. He told me that he heard the King Estate had either sold their bonds or proposed to sell their bonds, and that was one of the reasons that they wanted to get out also.

Q. What did you tell him when he told you they would sell their bonds if you could find somebody to pay ten?

A. I told him at the minute I do not know anybody.

Q. What happened after that?

A. I spoke to two or three people about them and nobody wanted to buy them, and I spoke to my sister-in-law and she said she would buy them; and I called Mr. Clay and I told him I had found a purchaser for them and when he would arrange to deliver those bonds let me know and I would endeavor to get a bank draft for it, which was done.

Q. I show you a copy of a letter addressed by Mrs. William Henry Hays, the secretary of the investment committee of the Young Women's Christian Association; addressed to Mr. Williamson, the assistant trust officer of the Fifth Avenue Bank, dated February 5, 1945, and ask you whether that copy of letter was sent to you in connection with the sale of these bonds owned by the Y.W.C.A.?

A. Yes, it was.

Mr. Kahn: I offer that in evidence.

Mr. Hanlon: May I just look at it?

Mr. Kahn: Yes, certainly (handing same to counsel).

Mr. Hanlon: No objection.

(The same is received in evidence and marked, "Respondents' Exhibit 4" of this date.)

Q. I also show you a certified copy of a resolution of the Young Women's Christian Association, adopted February 5, 1945, authorizing the sale of these \$7,550 face amount of debenture bonds, and ask you whether that was sent to you by either Mr. Clay or Mrs. Hays?

A. Yes it was. The signature is even guaranteed by [fol. 173] the Fifth Avenue Bank.

Mr. Kahn: Yes.

I offer that in evidence (handing document to Mr. Hanlon).

Mr. Hanlon: No objection.

(The same is received in evidence and marked, "Respondents' Exhibit 5" of this date.)

Q. Mr. Becker, do you happen to know whether Mrs. Hays, the secretary of the Young Women's Christian Association, is the wife of the Mr. Hays who was a director of the Calton Crescent?

A. Yes, she was.

Q. And was Mrs. Hays also a former director of the Calton Crescent?

A. I believe she was.

Q. Mr. Becker, a moment ago I was interrogating you about communications you had with Mr. Minor of Reynolds, Richards & McCutcheon before this sale of the bonds of the King Estate was made. I now show you a series of letters, some from Reynolds, Richards & McCutcheon and others from you to Reynolds, Richards & McCutcheon, and ask you to look at these, please, and tell me whether those letters were actually sent or received?

A. Yes, these all were.

Mr. Kahn: I offer those in evidence.

Mr. Hanlon: Do you offer them separately?

Mr. Kahn: Yes, I offer them separately.

Mr. Hanlon: Were those pencil marks—(interrupted by).

Mr. Kahn: I will not offer those. I don't know what they are, but I will disregard them.

Mr. Hanlon: No objection (further colloquy following).

The Referee: What do they purport to show?

[fol. 174] Mr. Kahn: They show, your Honor, that Mr. Minor was constantly asking about figures and information about the property, and these are the answers giving him the data.

The Referee: Minor was—(interrupted by.)

Mr. Kahn: (Interposing) A member of the firm of Reynolds, Richards & McCutcheon, the counsel for the King Estate.

I am arranging these in date order. I offer first in evidence the letter addressed by the secretary of Calton Crescent, Inc. to Mr. Kelly, Mr. Hays, Mr. Clay and Reynolds, Richards & McCutcheon, dated July 30, 1943.

(The same is received in evidence and marked, "Respondents' Exhibit 6" of this date.)

Mr. Kahn: I next offer in evidence a letter from the secretary of Calton Crescent, Inc. to Reynolds, Richards & McCutcheon, dated August 4, 1943.

(The same is received in evidence and marked "Respondents' Exhibit 7" of this date.)

Mr. Kahn: I next offer in evidence a letter from the secretary of Calton Crescent, Inc. to Reynolds, Richards & McCutcheon, dated August 23, 1944.

(The same is received in evidence and marked "Respondents' Exhibit 8" of this date.)

Mr. Kahn: I next offer in evidence—these are out of order because I got confused on the year—a letter from Reynolds, Richards & McCutcheon to Calton Crescent, dated September 24, 1943.

(The same is received in evidence and marked, "Respondents' Exhibit 9" of this date.)

Mr. Kahn: I next offer in evidence the reply to that letter dated September 27, 1943, addressed by the secretary of Calton Crescent, Inc. to Reynolds, Richards & McCutcheon.

[fol. 175] (The same is received in evidence and marked, "Respondents' Exhibit 10" of this date.)

Q. Mr. Becker, are you familiar with the purchase of some Calton Crescent bonds by Mr. Fribourg from William Henry Hays?

A. Yes, I remember something about it.

Q. What do you know about it, if anything?

A. William Henry Hays was a former director and stockholder and when he sold his bonds he asked me if I would not talk to Fribourg, that he thought he was entitled to a quarter or half a cent more than anybody else got for their bonds. I told him I didn't know. But when I talked to Fribourg, Fribourg said if he felt that way he would pay it to him; and when he sold his bonds he received something more than the other people did.

Q. Mr. Hays you say was a director of the company?

A. That is right.

Q. How long had he been a director?

A. Since the company was located—since the company was formed.

Q. Do you know if he held a membership on the New York Stock Exchange?

A. Yes, he did; he still does.

Q. Before he made this sale to Fribourg did you have any correspondence with him relating to the affairs of Calton Crescent?

A. I think about the time that the assignment of rents was given I had written to him about the condition of the company, yes.

Q. I now show you a letter addressed to you by Mr. Hays, dated August 2, 1943, and ask you if you received that letter?

A. Yes—yes, that is right.

Mr. Kahn: I would like to offer that in evidence.

Mr. Hanlon: No objection.

(The same is received in evidence and marked, "Respondents' Exhibit 11" of this date.)

[fol. 176] Q. Do you know, Mr. Becker, how long Mr. Hays continued to remain on the board of directors of the debtor?

A. He remained until he sold his stock and then he resigned.

Q. Do you recall when that was?

A. I think it was in the summer of '44, if I am not mistaken; either the spring or the summer.

Q. Did you meet him with any frequency at all?

A. I had seen him on and off at times, yes, sure.

Q. And did he ever ask you for information concerning the affairs of Calton Crescent aside from what was revealed at the stockholders' and board of directors' meetings?

A. Definitely yes, because he used to sign checks and stockholders' certificates, even before the assignment of the rents he used to sign stock certificates and I had to take them down there to have them countersigned by him.

Q. When you went down there for that purpose did you have frequent discussions with him about Calton Crescent?

A. Yes. He knew about the affairs of the company all the time until he resigned as a director.

Q. What makes you say he knew about these things?

A. Because he had seen copies of the monthly statements each month and he knew exactly about the condition.

Mr. Hanlon: I object to that.

Mr. Kahn: I consent to that.

Q. The monthly operations of the company—

A. (Interposing) Were furnished to him.

Q. (Continuing) Were furnished to him?

A. Yes, he saw them each and every month.

Q. Did he come regularly to the directors' meetings?

A. Yes, always.

Q. And were the affairs of this company discussed at these meetings?

A. Yes, very much so.

• • • • • • •

[fol. 177] Page 403

Q. Now, Mr. Becker, the amount mentioned in this last exhibit as owing on these operating bills was \$3,365.79. Does that refresh your recollection as to the amount?

A. Yes, I saw it in the papers just now.

Q. Where did you get the list of these bills?

A. The Westchester Trustees had been operating the property and they sent down a list of the bills that were owing at that time with which they hadn't any money to pay.

Q. What was done about paying these bills?

A. Well, the Basset Realty put up the money and paid the bills so that all of the creditors were appeased.

EXTRACTS FROM TESTIMONY OF STERLING B. JORDAN

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By Mr. Kahn:

Q. Even with those savings on the fuel and the elimination of the bus the property still continued to operate at a deficit?

A. It did.

The Referee: Until 1945?

The Witness: Yes.

• • • • • • •

Q. Now, during all of this period that you were in charge of the property, Mr. Jordan, did you confer with real estate brokers from time to time with regard to the sale of the property?

A. I did.

Q. Can you tell us approximately how many different brokers came to see you with regard to effecting a sale of this property?

A. There must have been a dozen.

Q. Did these brokers come and ask for information from you?

A. That is right.

[fol. 178] Page 449

Q. Concerning the rentals, the dimensions and the condition of the property?

A. That is right.

Q. Did you give the information that these brokers wanted?

A. I did.

Q. To all of them?

A. Yes, to all of them.

Q. Did you ask these brokers to submit any offer to you, if they had one?

A. I did.

Q. Did you at any time during the three years or more that you were in there as manager ever get an offer for any of that property from any of these brokers?

A. No, not one.

Q. Not a single one?

A. No.

Q. Did you tell these brokers if they had any offers that you would submit them to the owners?

A. I did.

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By Mr. Hanlon:

Q. Just what do you mean by that?

A. Well, we had people coming in and saying they were going to make an offer. When I say "a firm offer" that would be an offer accompanied by a check that would make it a real offer.

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Q. Wasn't there a belief in your organization that the situation steadily would improve in view of all conditions? My question is directed to '42.

A. Well, we were very pessimistic at that time; that is my recollection.

Q. When did that pessimism cease?

A. Because we were giving at that time concessions. We were giving concessions even in 1943.

[fol. 179] EXCERPT FROM RESPONDENTS' EXHIBIT 1 FOR IDENTIFICATION

AFFIDAVIT OF MYLES B. AMEND, VERIFIED JANUARY 29, 1942

\* \* \* At no time in the last several years have the income debentures of Calton Crescent, Inc. been selling at more than eight (8%) percent of the face value and the stock has had no market whatever apart from the income debentures. \* \* \*

As pointed out in the affidavit of Richard Kelly, sworn to January 29, 1942, the inability of the corporate defendant to complete the proposed sale will undoubtedly result in the foreclosure of the First Mortgage on its property and the loss of whatever equity may be left to the holders of its income debentures and stock.

[fol. 180]

## RESPONDENTS' EXHIBIT 3

## Calton Crescent, Inc.

## Operating statement for year ending December 31, 1944

Income		\$61,333.50
<b>Disbursements</b>		
Taxes on Real Estate		\$14,020.36
Interest on 1st Mortgage		7,197.55
Amortization on 1st Mortgage		3,500.00
Insurance		1,965.67
Fuel		4,932.68
Payroll for building help		7,818.74
Gas & Electric		2,302.87
Water		1,456.87
Mechanical Refrig. payments		1,121.00
Elevator mainten--ce		624.00
Franchise Tax		119.06
N. Y. State Unemployment Insurance		206.80
Federal Old Age Ins.		76.69
Renting Commission paid brokers		449.73
Advertising		53.27
Telephone		152.41
Management fees		2,397.60
Decorating		5,721.08
Exterminating		69.00
Garbage Removal		165.00
Supplies		1,766.91
Shades & Awnings		337.55
Window Screens		330.00
Repairs, Grounds, Landscaping		1,226.06
Repairs to building		4,478.81
Repairs, Plumbing, Refrig. etc.		477.47
Miscel. expenses		169.96
		\$63,137.14

## [fol. 181] EXCERPT FROM RESPONDENTS' EXHIBIT 4

February 5, 1945.

Mr. G. S. Williamson, Assistant Trust Officer, The Fifth Avenue Bank of New York, 530 Fifth Avenue, New York 19, N. Y.

DEAR MR. WILLIAMSON:

You are hereby authorized to sell to Norman S. Becker, 11 West 42nd Street, New York, N. Y. for account of the Board of Trustees of The Y.W.C.A. of the City of New York, securities as follows:

151 shares common capital stock of Calton Crescent, Inc.

\$7,550. income debenture bonds of Calton Crescent, Inc. maturing September 27, 1953.

Transfer of the above securities to Mr. Becker is to be made upon receipt of payment of \$750. net to The Y.W.C.A. of the City of New York.

• • • • • • •

The proceeds of the above sale are to be credited to the Board of Trustees' Account.

Please send reports of the above sale to the Business Manager-Comptroller of The Y.W.C.A. of the City of New York, 129 East 52nd Street, New York, N. Y.

By authority of the Investment Committee of the Board of Trustees of The Y.W.C.A. of the City of New York.

Yours very truly, Mrs. William Henry Hays, Secretary, Investment Committee.

JK

[fol. 182]

## RESPONDENTS' EXHIBIT 6

(Letterhead of)

Calton Crescent, Inc.  
 11 West 42nd Street  
 New York

July 30th, 1943.

DEAR SIR:

The Poughkeepsie Savings Bank holders of the first mortgage on our property have served notice of their intention to foreclose the mortgage because of our failure to pay the 3rd quarter of the real estate tax to the City of New Rochelle, due July 1st, the last day for payment of said tax is July 31st 1943.

We will have no funds on hand with which to pay these taxes. The 2nd quarter tax which was due on April 1st was paid last week, namely July 20th 1943.

We will therefore be faced with the following payments in the next 30 days:

\$3,585.00—3rd quarter tax due July 1st 1943.

2,700.00—Interest and Amortization due Aug. 1, 1943.

4,000.00—Current bills owing creditors.

---

\$10,285.00

Our collections are about \$4,600.00 monthly, and even if we apply the next 3 months collections to the payment of the above current obligations, we would be in no better position to pay the next installment of taxes and interest and amortization.

Mr. Kelly is familiar with the situation and at his suggestion, I am informing all of the officers and directors of our financial condition, as it is one of utmost seriousness.

[fol. 183] I would like an expression of opinion from all the officers and directors, and await your early advices as to what steps can be taken to overcome the above mentioned deficiencies and forestall foreclosure.

Very truly yours, Calton Crescent Inc., — — —,  
 Secretary.

Copies sent to: Mr. Richard Kelly, Mr. Wm. Henry Hays,  
 Mr. Arvah E. Clay, Messrs. Reynolds Richards & Mc-  
 Cutcheon.

[fol. 184]

## RESPONDENTS' EXHIBIT 7

August 4, 1943.

Reynolds, Richards & McCutcheon, 68 William Street, New York City.

DEAR SIRS:

In accordance with the request contained in your favor of the 3rd, we are itemizing disbursements from the monthly statement:

Taxes	3,671.45	Repairs	2,581.19
Interest	4,067.61	Labor	3,464.35
Amtz.	1,750.	Elevator Man.	260.
Water	670.04	Painting, supplies	
Insurance	1,011.34	and all sundry	
Legal fees	236.25	expense	4,885.60
Directors fees	100.		
Officers Salary	600.		<hr/> \$11,191.14
Unemployment So- cial Security	272.02		
Boiler Conv.	679.		
Management	770.40		
Gas & Electric	1,242.81		
Fuel	1,665.34		
Refrig. payment	1,032.60		
			<hr/> \$17,768.86

Very truly yours, — — —, Calton Crescent, Inc.,  
Seey.

[fol. 185]

## RESPONDENTS' EXHIBIT 8

August 23, 1944.

Reynolds Richards & McCutcheon, 68 William Street, New York City, N. Y.

Attention Mr. R. Minor

DEAR SIRS:

In accordance with your request we are listing the results of operations for the period January 1st to July 31st:

	Income	Disbursements
January	\$4,675.50	5,571.83
February	5,055.50	4,629.97
March	5,160.50	5,737.89
April	4,999.00	5,145.10
May	4,757.00	4,356.44
June	5,168.00	4,107.60
July	5,418.00	6,480.19
	<hr/> \$35,233.50	<hr/> \$36,929.02

As of July 31st 1944 there was due on mortgages,

1st Mortgage	\$159,250.—
2nd Mortgage	20,921.63 with interest
Operating bills	6,575.— payable

Trusting that this is the information that you desire,

Very truly yours, — — —, Calton Crescent Inc.,  
Secy.

(Letterhead of)

Reynolds, Richards & McCutcheon  
Attorneys and Counselors at Law  
68 William Street  
New York 5, N. Y.

September 24, 1943.

Calton Crescent, Inc., 11 West 42nd Street, New York, N. Y.

Attention of Mr. Norman S. Becker, Secretary

DEAR MR. BECKER:

At your convenience would you please let us have the following information:

- (1) The present principal amount of the first mortgage held by the Poughkeepsie Savings Bank.
- (2) The present principal amount of the second mortgage plus the amount of arrears on the first mortgage paid by the second mortgagee.

Very truly yours, Reynolds Richards & McCutcheon.

September 27, 1943.

Reynolds, Richards & McCutcheon, 68 William Street, New York City, N. Y.

DEAR SIRS:

In reply to your favor of the 24th instant, please be advised that the present amount due on the first mortgage is \$161,875.—. The amount due on the 2nd mortgage is \$15,000.— plus \$3,804.04 advanced by the holder of the 2nd mortgage. The amount of bills outstanding and unpaid is about \$4,000.—.

Trusting that this is the information that you desire, we are,

Very truly yours, — — —, Calton Crescent Inc.,  
Secy.

[fol. 188] RESPONDENTS' EXHIBIT 11

BOWLING GREEN 9-7027

William Henry Hays  
Member of the New York Stock Exchange  
71 Broadway  
New York

August 2, 1943.

Mr. Norman S. Becker, 11 West 42nd Street, New York,  
N. Y.

Re: Calton Crescent, Inc.

DEAR SIR:

Your letter of July 30th reached me this morning. Needless to say I am not at all surprised at the financial condition of the company. I have struggled with this situation for more than ten years and for a long while have realized that it is hopeless. I can see no way out of the situation because no one would lend us the money to pay interest and taxes, and we would only be getting in deeper through further borrowing. I think that we shall have to officiate at the last rites.

Mr. Kelly also wrote me similarly and enclosed a draft of the minutes of the Directors meeting held March 27, 1943, asking me as well as other directors to notify you if we had any corrections or additions. The minutes as drafted by Mr. Kelly appear to me to be correct though it is of course impossible for a busy man to have accurate recollection of what transpired at a Directors meeting held over four months ago.

Very truly yours, Wm. Henry Hays.

W.H.H.:B.

Dollar Savings Bank  
of the City of New York  
Third Avenue at 147th Street  
New York 55, N. Y.

Wm. B. Westerfield, Assistant Treasurer.

September 18, 1944.

Carlton Crescent, Inc., c/o Mr. Norman Becker, Secretary  
11 West 42nd Street, New York 18, N. Y.

Re: 43 Carlton Road, New Rochelle, N. Y.

DEAR SIR:

In connection with your application for a first mortgage loan covering the above premises, we regret to advise you that we are not interested in this application because of the amount requested.

We thank you for your inquiry, however, and perhaps we may be of service to you at some future date.

Very truly yours, Wm. B. Westerfield, Assistant Treasurer.

WBW:rw.

SUPREME COURT, NEW YORK COUNTY

SANFORD BECKER, ET AL., PLAINTIFFS.

against

RICHARD KELLY, ET AL., DEFENDANTS

STATE OF NEW YORK,

County of New York, ss:

William Henry Hays, being duly sworn, deposes and says that he is one of the above named defendants and is the Vice-President and a Director of the defendant Carlton Crescent, Inc.

That he has read the foregoing affidavit of Richard Kelly, sworn to the 29th day of January, 1942, and that

the statements in said affidavit are all correct to the best of deponent's knowledge, information and belief.

Deponent particularly states that he received full detailed reports monthly from Keeler Real Estate Corporation, of its management of the property—Calton Court Apartments, and diligently examined the same and conferred as to the same with Keeler Real Estate Corporation, and deponent has also many times visited the property and is familiar with the condition thereof, and that the [fol. 191] condition thereof is as reported by Mr. Kelly to the stockholders as stated in his affidavit. That in addition to his trusteeship of the Estate of Ella H. Myers, referred to in said affidavit of Richard Kelly, the deponent's wife holds thirty (30) shares of stock and Fifteen Hundred (\$1500.00) Dollars of Income Debentures of Calton Crescent, Inc.

William Henry Hays.

Sworn to before me this 29th day of January, 1942.

Isabel Stahl, Notary Public, Westchester County.

Cert. filed in N. Y. Co. No. 1001, Reg. No. 3-S-629.

Cert. filed in Bronx Co. No. 52, Reg. No. 222-S-43.

Commission expires March 30, 1943.

[fol. 192] SUPREME COURT, NEW YORK COUNTY

SANFORD BECKER, ET AL., PLAINTIFFS

against

RICHARD KELLY, ET AL., DEFENDANTS

STATE OF NEW YORK,

City and County of New York, ss:

Arvah E. Clay, being duly sworn, deposes and says, that he is one of the defendants herein, and was elected a Director of the defendant Calton Crescent, Inc. on March 2, 1938, and was elected its Treasurer on March 21, 1938, and has at all times thereafter been such Director and Treasurer.

That he has read the foregoing affidavit of Richard Kelly, sworn to the 29th day of January, 1942, and that

the statements in said affidavit are all correct to the best of deponent's knowledge, information and belief.

Deponent particularly states that he received full, detailed reports monthly from Keeler Real Estate Corporation of its management of the property, Calton Court Apartments, and diligently examined the same and conferred as to the same with Keeler Real Estate Corporation, and deponent has also many times visited the property and [fol. 193] is familiar with the condition thereof, and that the condition thereof is as reported by Mr. Kelly to the stockholders as stated in his affidavit.

Arvah E. Clay.

Sworn to before me this 29th day of January, 1942.

Isabel Stahl, Notary Public, Westchester County.

Cert. filed in N. Y. Co. No. 1001, Reg. No. 3-S-629.

Cert. filed in Bronx Co. No. 52, Reg. No. 222-S-43.

Commission expires March 30, 1943.

{fol. 194] EXCERPT FROM RESPONDENTS' EXHIBIT 18

Calton Crescent, Inc.  
11 West 42nd Street  
New York

May 2, 1944

Mr. Sanford Becker, 11 West 42nd Street, New York 18,  
N. Y.

DEAR MR. BECKER:—

In accordance with our conversation of this morning, I have drafted a letter to be written by Mr. Winter, more fully setting forth his offer to our security holders and giving the information necessary for them to have in forwarding their securities, and I have also drafted a letter to be written to me as president, submitting the same, and I would appreciate it if you would submit these two letters to Mr. Winter, so that the matter can be promptly taken up, and under the circumstances I think it would be proper for us to attend to the mailing of this letter, but as we have no funds it would be necessary for Mr. Winter to pay the expense of printing and mailing the letter, which I understood from you he would probably be willing to do.

Before the letter of Mr. Winter is printed he should, I think, submit it to the Corn Exchange Bank so as to be certain that the practice outlined therein will meet with its approval when the securities are presented.

Very truly yours, Calton Crescent, Inc., by (signed)  
Richard Kelly, President.

[fol. 195]

## RESPONDENTS' EXHIBIT 19

July 22, 1942	Shea & Co. 150 Broadway	500.—
Aug. 5, 1942	Russell M. Van Kirk, Interlaken	500.—
Aug. 12, 1942	Chas Dean & Co.	5,000.—
Aug. 18, 1942	Carl M. Loeb Rhoades & Co.	2,000.—
Oct. 17, 1942	Alfred T. Brady	50.—
Dec. 28, 1942	Dominick & Dominick	50.—
May 17, 1943	Hart, Smith & Co.	1,500.—
May 20, 1943	Ruby Goldwater	50.—
Nov. 17, 1943	T. B. Bassett, Halsey Stuart Co.	1,000.—
Dec. 8, 1943	Hoppin Bros & Co.	3,000.—
Dec. 8, 1943	Delafield & Delafield	3,000.—
Dec. 15, 1943	Merrill Lynch, Pierce, Ferne	1,500.—
Dec. 15, 1943	Robert D. Sterling	4,000.—
Jan. 17, 1944	J. S. Bache & Co.	1,500.—
Jan. 26, 1944	Brown, Lisle & Marshall	500.—
Feb. 16, 1944	Shea & Co.	5,000.—
Apr. 28, 1944	Ethel T. Kramer	1,500.—
Apr. 28, 1944	Kissel Kinnicutt & Co.	500.—
May 5, 1944	Mirian Ross	1,000.—
May 5, 1944	N. H. Lewis, May & Co.	4,500.—
May 19, 1944	Hoppin Bros & Co.	3,000.—
Oct. 2, 1944	Irving Zauderer	1,250.—
Oct. 2, 1944	Chas & Milton Kimmelman	1,250.—
Feb. 1, 1945	L. D. Sherman & Co.	2,500.—
Feb. 9, 1945	Dorothy E. Nurnberger	500.—
Mar. 1, 1945	Helen T. Barker	500.—
Aug. 20, 1945	Merrill Lynch, Pierce, Ferne	250.—
Nov. 14, 1945	Samuel E. Magid	1,950.—
Nov. 14, 1945	Columbus Trust Co.	500.—
Nov. 14, 1945	Craigmyle, Pinney & Co.	500.—
June 1, 1946	Merrill Lynch, Pierce, Ferne	500.—
June 25, 1946	Toby Erlitz	750.—

[fol. 196]

## RESPONDENTS' EXHIBIT 22

November 18th, 1943.

Mr. Thomas Thompson, 171 Edmund Avenue, Paterson,  
New Jersey.

DEAR SIR:

Replying to your letter of November 17th, the stockholders about three years ago authorized a sale of the property at a price, which, after paying all obligations and expenses, might have produced nearly Ten Cents on the Dollar for the bondholders. The purchaser, however, defaulted on its contract and forfeited its deposit of \$1,000.00.

About a year later another offer was made which might have netted nearly Five Cents on the Dollar for the bondholders and this offer was submitted to the stockholders and failed to receive their approval and the stockholders authorized the borrowing of \$15,000.00 to meet past due obligations and a second mortgage to secure its repayment, which was done.

Since then, there appears to have been no improvement in the earnings of the property and about two months ago the possession was taken on behalf of the second mortgagee which had advanced monies to pay taxes and had never received any payment on account of its second mortgage and I can hold out no reasonable hope that anything will be realized for the bondholders. Neither of the above offers could of course have realized anything for the stockholders as the amounts received would have been sufficient only to make a small payment on account of the bonds.

Annual Reports as President and other communications from the officers and directors have from time to time been sent to stockholders and have I assumed been received by you.

Very truly yours, Calton Crescent, Inc., by Richard Kelly, President.

K/CW

[fol. 197]

## RESPONDENTS' EXHIBIT 23

(Letterhead of)

Calton Crescent, Inc.  
11 West 42nd Street  
New York

September 14, 1943.

Mr. Alfred F. King, 1230 Sixth Avenue, New York 20, N. Y.

DEAR ALFRED:

Our Secretary, Mr. Norman S. Becker, wrote our Directors on July 30, 1943, explaining the present status of our corporation, which was that the Poughkeepsie Savings Bank was threatening to foreclose its mortgage because of our failure to pay the third-quarter of the real estate tax to the City of New Rochelle, due July 1, 1943, and sent a copy of his letter to Reynolds, Richards & McCutcheon, by reason of the fact that the Estate of J. Berre King is the largest security holder of the corporation.

Since then interest in the sum of \$1,832.14 and amortization is the sum of \$875, both due August 1, 1943, have been paid to the Poughkeepsie Savings Bank, reducing the principal amount of the mortgage held by the Bank to \$161,875, but the taxes due July 1st have not yet been paid, and the corporation, after paying such interest and amortization and its current bills, has no funds with which to make such payment.

The current receipts of the Company are not more than enough to take care of its current expenses, including interest and taxes, and are also not sufficient to take care of the reduction or even of the interest due on the second mortgage of \$15,000, so that there is no reasonable certainty that the corporation, will, in the immediate future, be in better position than it now is, even if the Poughkeepsie Savings Bank [fol. 198] waives further amortization on its mortgage and the holder of the second mortgage takes no action in connection with the principal and interest due thereon.

It is, therefore, appropriate that you should be advised as to the situation as Trustee of the Estate of J. Berre King, so that you may consider whether it is possible for

you, as Trustee, or for the beneficiaries or persons interested in the trust, to do anything either for the assistance of the corporation or for the protection of their own investment in the property.

The present situation of the property is, of course, due very largely to the general decline in the values of real estate in New York City and its suburbs, and to the very excessive assessments of such real estate for taxes and the very high rates of taxes imposed by the various municipalities, and these conditions have made almost every mortgage placed at the time when the original mortgage on Calton Court Apartments was placed, a mortgage not only excessive as a safe investment, but in very many cases a mortgage in excess of the actual value of the property involved.

In addition to these general conditions affecting real estate there is also the fact that Calton Court Apartments was a very poorly constructed building. It is an impressive looking building and it has a beautiful location north of New Rochelle, but it has been described by Mr. Edward A. Keeler, who was our secretary and managing agent until last year, as the worst constructed building that he ever saw. This condition, unfortunately, was not ascertainable on an inspection of the building and was discovered only after our corporation had taken possession and found the enormous additional cost necessary to remedy the original defects of construction.

The condition was briefly described in my annual report for 1937, and I sent you copies of the various printed re-  
[fol. 199] ports, and in a letter to you, dated January 23, 1942, quoted fully portions of my report which it was considered inadvisable to print and distribute generally.

In addition to this, the cities in Westchester County, like New Rochelle, had been unusually guilty of the imposition of very high assessments on real estate and very high rates of taxes.

During the foreclosure of the original mortgage securing the old bonds, a receiver was appointed, and it was the general opinion that he had filled vacancies in the building with undesirable and irresponsible tenants and thereby created a situation in respect to tenancies which it has been very difficult to deal with.

• • • • •

The property was originally managed for us by Mr. Edward A. Keeler, in whom our Directors had full confidence, but he was never able to make provision, after expenses of management and our current expenses, to realize enough to enable us to reduce the amount of the first mortgage as required, in addition to paying interest and taxes.

The property is now being managed for us by the Westchester Trustees and the result of their management does not appear to be substantially better, and we would therefore appreciate any suggestions which you may desire to make as to anything which we can do in the matter so as to avoid, if possible, the foreclosure of the first mortgage and the resulting total loss to all of our security holders.

With best regards,

Very truly yours, Calton Crescent, Inc., by Richard Kelly, President.

K/W

[fol. 200]

**RESPONDENTS' EXHIBIT 24**

(Letterhead of)

**Calton Crescent, Inc.**

**420 Lexington Avenue**

**New York 18**

**September 23rd, 1943.**

**Mr. Alfred F. King, 1230 Sixth Avenue, New York 20, N. Y.**

**DEAR ALFRED:**

At a meeting of the Board of Directors of Calton Crescent, Inc. held yesterday the following resolution was adopted:

"Whereas, the third quarter of the taxes on Calton Court Apartments due July 1, 1943, and the installment of interest due July 7, 1943, on the second mortgage held by Baset Realty Corporation have not been paid and funds are not available to make either of said payments after first paying or providing for the current operating expenses of the property and by reason thereof Poughkeepsie Savings Bank as holder of the

first mortgage and Baset Realty Corporation as holder of the second mortgage are in position to foreclose the mortgages held by them respectively and it is desired if possible to avoid such foreclosures:

Now, therefore, it is resolved that the officers be and they hereby are authorized in their discretion to make execute and deliver to Poughkeepsie Savings Bank an assignment of the rents of Calton Court Apartments containing such provisions as they in their discretion shall deem reasonable, necessary and proper; and,

[foi. 201] Further resolved that the officers of the corporation upon being furnished with evidence that Baset Realty Corporation has paid past due taxes upon Calton Court Apartments or has paid past due installments of principal or interest due on the first mortgage held by Poughkeepsie Savings Bank be and they hereby are authorized in their discretion to make, execute and deliver to Baset Realty Corporation an assignment of the rents of Calton Court Apartments containing such provisions as they in their discretion shall deem reasonable, necessary and proper unless such rents have previously been assigned to Poughkeepsie Savings Bank by an assignment of rents made, executed and delivered to it as hereinbefore authorized."

I might note that under the first mortgage held by the Poughkeepsie Savings Bank the execution of an assignment of rents to the second mortgagee would entitle the Poughkeepsie Savings Bank to declare the principal sum and interest on the mortgage immediately due, but it is not, of course, likely that they would take advantage of this provision so long as the taxes, interest and amortization were being kept up with reasonable diligence.

I have, of course, no means of knowing whether, and, if so, how soon the Baset Realty Corporation would take advantage of the defaults and commence foreclosure of its own second mortgage:

Very truly yours, Calton Crescent, Inc., by Richard Kehy, President.

K/CW.

P. S.—I am sending a copy of this letter to Reynolds, Richards and McCutcheon, Esqs.—R. K.

[fol. 202]

## RESPONDENTS' EXHIBIT 25A

December 10, 1943.

Manufacturers Trust Company, 55 Broad Street, New York City.

Attention Mr. Gage

DEAR SIRS:—

In accordance with your request we are quoting figures of the Calton Court Apartments for 11 months of this year;

Collections	Disbursements
\$52,294.80	\$55,618.62

In addition the 2nd mortgagee advanced about \$6,000.— and unpaid current operating bills are about \$4,000.—

We are enclosing letter to the superintendent so that you may make an inspection of the premises.

Yours very truly, Calton Crescent, Inc., Norman S. Becker, Secy.

[fol. 203]

## RESPONDENTS' EXHIBIT 25B

December 21st, 1943.

Manufacturers Trust Company, Corporate Trust Department, 55 Broad Street, New York 15, N. Y.

DEAR SIRS:—

Enclosed please find our check for \$254.90, in payment of your annual fee and disbursements as Trustee under our Indenture, etc., as per your enclosed statement, which I would appreciate if you would receipt and return.

It has been necessary for us to give an Assignment of Rents to the second mortgagee, who is now in possession of the property collecting rents, and the funds remaining in our possession or otherwise available for us will probably not be sufficient to enable us to make any further payments to you as Trustee or Registrar, or to pay an accountant for the preparation of the annual audit which is required to be filed with you under terms of our Indenture and will probably also not be sufficient to pay the expense of preparing and mailing notices of our next annual meeting of stockholders or the usual annual report to our stockholders.

We are, of course, already in default in connection with payments due both to the first and second mortgagee and in the payment of taxes and we are notifying you so that you may be fully advised of the present situation.

Our stockholders have been kept informed of the situation down to the time when they authorized the second mortgage on the property and as we understand that the holders of our debentures under the Indenture of which [fol. 204] you are Trustee are all stockholders it would seem that the holders of said debentures have also been fully advised as to the same.

If by reason of these defaults, it would be your desire to address a communication to the debenture holders for whom you are Trustee, I would be glad to cooperate in the preparation of such communication and give them the full information which would ordinarily be given in my annual report as President so that the persons who are stockholders and holders of debentures may at the same time be fully advised.

Very truly yours, Calton Crescent, Inc., By Richard Kelly, President.

K/CW

Enc.

[fol. 205]

**RESPONDENTS' EXHIBIT 25C**

**Manufacturers Trust Co.**  
55 Broad Street

December 23, 1943.

**Re Calton Crescent, Inc., Property**

**Calton Crescent, Inc., 11 West 42nd Street, New York, N. Y.**

**Attention Mr. Richard Kelly, President**

**DEAR SIRS:—**

Receipt is herewith acknowledged of your letter of December 21, 1943, enclosing your check in the amount of \$254.90, in payment of our annual fee and disbursements as Trustee. A Duplicate copy of our invoiced acknowledging payment will be sent to you under separate cover.

While we have known for several weeks that your company had given an assignment of rents to the second mort-

gatee—this notice having been given to us as a result of a visit made by Mr. Norman S. Becker, Secretary, with the undersigned—your letter of December 21st represents the first official written notice from your company that certain actions have been taken which may be construed as defaults under the provisions of the indenture.

We are not prepared to say what course, if any, we will pursue, but for your information we have referred our file to our counsel for proper advice and direction. In the meantime, as you already know, we have asked for and received proper letters which would admit our representative to the premises so that a proper report could be made with regard to the condition of the property.

Yours very truly, Frank P. Gage, Trust Officer.

[fol. 206]

RESPONDENTS' EXHIBIT 25D

Manufacturers Trust Co.  
55 Broad Street

Feb. 2, 1944.

Re Calton Crescent, Inc.

Mr. Richard Kelly, President, Calton Crescent, Inc., 11 West 42nd Street, New York, N. Y.

DEAR SIR:—

I refer you to your letter of December 21, 1943, in which you advised us that the company is without funds to engage a firm of Certified Public Accountants for the preparation of the annual audit, which is required to be filed with the Trustee under the terms of the indenture, and also your offer of assistance in the event we contemplated addressing a communication to the debenture holders.

We have been advised by counsel that the defaults in the indenture, which were called to our attention by Mr. Becker, Secretary, and which are also admitted in your letter of December 21, 1943, should be called to the attention of the debenture holders in an appropriate communication. In order to accomplish this, however, we require the following

information, which we would appreciate your furnishing us at your earliest convenience:

1. Summarized statement of income and expenses for the calendar year 1942, in the form of Exhibit A contained in Schwartz & Holtz's report of December 21, 1942. These figures need not be carried beyond "oper. [fol. 207] ating loss" or "operating profit," whichever the case may be.
2. Resume of the First mortgage setting forth (a) Name of Mortgagee; (b) original date of the Mortgage; (c) Expiration date; (d) Original principal amount of the Mortgage; (e) Unpaid principal amount; (f) Interest rate; (g) Schedule of principal amortization payments.
3. Resume of the Second Mortgage setting forth the same information as requested in respect of the First Mortgage.
4. Copy of the assignment of rents agreement executed between your company and the Second Mortgagee.

In view of your letter of December 21st to the effect that the company has no funds to furnish an audited statement, we will accept for purposes of communicating with the bondholders a similar statement prepared by the treasurer of the company.

Against we request that you please give this your prompt attention.

Yours very truly, Frank P. Gage, Trust Officer.

[fol. 208]

RESPONDENTS' EXHIBIT 25E

March 28th, 1944.

Manufacturers Trust Company, 55 Broad Street, New York  
15 N. Y.

Att: Mr. Frank P. Gage

DEAR SIRS:—

Enclosed please find a statement of our receipts and disbursements for the calendar year 1943 prepared and signed

our Treasurer which we are sending you in lieu of the audit required by our Indenture since we have no funds with which to pay for the making of such audit.

You will note that the statement shows not only our payments and disbursements, but also the payments and disbursements made by Baset Realty Corporation as mortgagee in possession since September 30th, 1943.

I might note that Baset Realty Corporation paid with its own funds \$500. for coal and \$3,616.54 for real estate taxes which are included in the second column as paid, by it, and it also deposited in the special account opened by it as mortgagee in possession the sum of \$1800. of its own money, which is, of course, not shown as a receipt in the enclosed statement.

The enclosed statement shows that all interest and amortization on the first mortgage and all real estate taxes due prior to January 1st, 1944, have been paid either by us as owner or by Baset Realty Corporation as mortgagee, but there is still due Baset Realty Corporation \$375. interest on the second mortgage and also the monies advanced by it, as aforesaid. I have no record as to the amount of outstanding unpaid operating expenses.

Pl. 209] The foregoing gives you, I think, all the information we can give which was desired by you for the purpose of preparing a letter to the holders of our debentures and I would personally be very glad to look over your draft of such letter before it is sent out and make any suggestions which might occur to me.

Very truly yours, Calton Crescent, Inc., By Richard Kelly, President.

K/CW  
Enc.

Pl. 210] RESPONDENTS' EXHIBIT 25F

April 19th, 1944

Manufacturers Trust Company, Corporate Trust Department, 55 Broad Street, New York 15, N. Y.

DEAR SIRS:—

Your bill of April 17th, for \$262.98 is received and as we have previously explained to you we have no funds whatsoever available to pay the same and have not even

had funds available to pay our current franchise tax and our only asset is Calton Court Apartments which is in possession of the second mortgagee, as previously explained.

You have written as to your desire to send a letter to the holders of our debentures and if you do so we would appreciate if you would send at least a half dozen copies thereof to our President, Mr. Richard Kelly, at 233 Broadway, so that he may have them available for our file and for our directors and he would be very glad to cooperate with you in the preparation of any such letter which you may desire to send.

Very truly yours, Calton Crescent, Inc., By Richard Kelly, President.

K/CW.

[fol. 211]

OBJECTOR'S EXHIBIT 8

Minutes of Special Meeting of Board of Directors of Calton Crescent, Inc. Held April 7, 1942

Included in these minutes was a communication of Myles B. Amend dated April 7, 1942, addressed to Baset Realty Corporation and Calton Crescent, Inc., from which the following is an excerpt:

"I acknowledge receipt from Baset Realty Corporation of two checks of Sanford Becker, one for \$12,500.00 and the other for \$2,500.00 representing the loan to be secured by the bond and mortgage above referred to."

[fol. 212] OBJECTOR'S EXHIBIT 9 FOR IDENTIFICATION

Law Offices

Richard Kelly

233 Broadway

Richard Kelly

George E. Ferguson

New York April 16th, 1942

Mr. Sanford Becker, 11 West 42nd Street, New York City

DEAR MR. BECKER:—

In case any of the stockholders of Calton Crescent, Inc. desire to participate in the second mortgage, you may be interested in the form of certificate which was used in con-

nection with the second mortgage placed upon the property at the time of the reorganization for the purpose of providing for the payment of the Protective Committee and various other expenses which could not be taken care of out of the first mortgage originally placed.

The form is, of course, entirely different from what you would want to use, but the provisions thereof may be suggestive as to what should be contained in any certificate given evidencing the purchase of an interest in the new second mortgage.

Presumably, it would not be desirable to have any instrument in connection therewith put on record in the Register's Office.

Very truly yours, Richard Kelly.

K/CW. Enc.

[fol. 213]      **OBJECTOR'S EXHIBIT 24**

To the Stockholders of Calton Crescent, Inc.:

At our Annual Meeting, held February 17, 1942, Mr. Sanford Becker, who holds \$5,000 of our income debentures and 100 shares of our stock, representing an original investment of \$10,000., offered to procure for us a second mortgage loan of \$15,000.

At the same meeting, Mr. Becker stated that any stockholder might participate in the proposed second mortgage in proportion to his holding. Practical considerations require that any such participation shall be in units of not less than \$100., and the mortgagee authorizes us to state that it will divide the mortgage into 150 parts of \$100. each, all equal in rights; that any stockholder of this corporation who desires to purchase one or more of such parts at par may do so by notifying Mr. Sanford Becker, at 11 West 42nd Street, New York City, on or before April 25th, 1942, and remitting to order of Baset Realty Corporation the par value of the parts desired; that each stockholder may purchase one part for each 35 shares of stock held on April 1st, 1942; and a holder of less than 35 shares may purchase one part of the mortgage, if there is any part not purchased by holders of more shares; and that all remittances by stockholders for whom no part is available will be promptly returned.

Dated April 7, 1942.

Richard Kelly, President; Wm. Henry Hays, Vice President; Myles B. Amend, Director.

[fol. 214]

## OBJECTOR'S EXHIBIT 27

Cash Receipts and Disbursements by or for the Benefit of  
Calton Crescent, Inc. for 1943

Receipts	By Owner	By Mortgagee	Total
Rent (not including employees' apts.)	\$42,473.80	\$14,581.00	\$57,054.80
Miscellaneous Income	114.72	.....	114.72
<b>Total Collections</b>	<b>\$42,588.52</b>	<b>\$14,581.00</b>	<b>\$57,169.52</b>
Paid by owner to Mortgagee	345.00	345.00	.....
<b>Adjusted Total Receipts</b>	<b>\$42,243.52</b>	<b>\$14,926.00</b>	<b>\$57,169.52</b>
<b>Payments</b>			
Interest on First Mortgage	\$ 5,524.75	\$ 1,824.48	\$ 7,349.23
Interest on Second Mortgage	375.00	.....	375.00
Real Estate Taxes	7,190.78	7,174.41	14,365.19
Advertising	122.80	97.80	220.60
Accounting	200.00	.....	200.00
Boiler Conversion	679.00	.....	679.00
Gas Operation	152.52	.....	152.52
Collection Fees	119.00	.....	119.00
Decorating	3,035.50	1,662.63	4,698.13
Directors' fees	140.00	.....	140.00
Exterminator	45.00	10.00	55.00
Elevator Maintenance	416.00	208.00	624.00
Franchise Tax	107.59	.....	107.59
Fuel	5,025.69	2,629.11	7,654.80
Gas and Electric	1,779.56	562.99	2,342.55
Garbage Removal	136.00	60.00	196.00
Garbage Payroll	900.00	352.74	1,252.74
Insurance	1,305.97	265.80	1,571.77
Management Fees	1,155.60	535.20	1,690.80
Miscellaneous	249.43	34.23	283.66
Legal Fees	392.50	.....	392.50
Payroll (not including apts. occupied)	3,874.41	1,333.26	5,207.67
<b>[fol. 215]</b>			
Refrigerator Maintenance	.....	158.75	158.75
Repairs and Replacements	2,078.67	1,034.07	3,112.74
Renting Expense	93.00	69.00	162.00
Roof Maintenance	160.00	15.00	175.00
Salaries of President and Secretary (Less \$9 FOAB)	891.00	.....	891.00
Supplies	1,261.05	408.41	1,669.46
Social Security Taxes (F.O.A.B.)	187.54	.....	187.54
Stationery and Postage	75.45	20.25	95.70
Telephone	99.02	46.98	146.00
Trustees' Fees	254.90	.....	254.90
Unemployment Insurance Tax —Federal	48.89	.....	48.89
Unemployment Insurance Tax —State	239.32	.....	239.32
Victory and Income Taxes Withheld and Paid	199.22	.....	199.22
Water	1,001.80	327.42	1,329.22
Amortization of First Mortgage	2,625.00	875.00	3,500.00
Mechanical Refrigerators	1,561.53	177.75	1,739.28
<b>Total Disbursements</b>	<b>\$43,703.49</b>	<b>\$19,883.28</b>	<b>\$63,586.77</b>

I hereby certify that the foregoing statement correctly shows the receipts and disbursements of Calton Crescent, Inc., as shown by its records, and the receipts and disbursements of Baset Realty Corp. as mortgagee in possession as shown by the monthly statements of its managing agent.

SANFORD BECKER  
Treasurer

[fol. 216]

## OBJECTOR'S EXHIBIT 29

Calton Crescent, Inc.  
11 West 42nd Street  
New York 18, N. Y.

To the Stockholders of Calton Crescent, Inc.

Notice is hereby given that the Annual Meeting of the stockholders of Calton Crescent, Inc. will be held on the 15th day of February, 1944, at Three o'clock in the afternoon at the office of the Company, 11 West 42nd Street, New York, N. Y., for the purpose of electing directors of the Corporation and for the transaction of such other business as may properly come before the meeting.

Dated, New York, January 26th, 1944.

Norman S. Becker, Secretary.

Postscript by the President:

Your personal attendance is urged, especially since the company has no funds available to present and forward to stockholders the earning statement and balance sheet, as has been done in previous years, and the officers cannot assume the burden of answering letters inquiring as to the business or condition of the company, and stockholders desiring such information will have to examine the books and records of the company at its office.

Whether or not you expect to attend the meeting, please execute and return the enclosed proxy (which you may revoke at any time and which will be used only if you do not attend) so that we may be certain of a quorum.

We have been required to discontinue the bus, which combined with gasoline rationing, deprives our tenants of reasonable transit facilities.

[fol. 217] The net results of the operation continued insufficient to meet current obligations. On September 30, 1943, the company had not paid the taxes due July 1, 1943, and had made no payment on account of interest on the second mortgage, and had no funds available to pay either, and its funds on hand were even insufficient to pay the amounts then due for its current operating expenses. Baset Realty Corporation, as second mortgagee, demanded possession of the property and an assignment of the rents, to

both of which it was then entitled under the terms of its mortgage, and such assignment was executed and possession given as of September 30, 1943, and Baset Realty Corporation is now in possession collecting rents pursuant thereto. It has continued the "Westchester Trustees" as its managing agent.

Aside from the property itself the only apparent asset of the company is its bank account in which there is now \$84.12, from which must be paid \$19.19 Federal Unemployment Insurance Tax. This balance is much less than the Franchise Tax which is payable on or before March 1st.

I can express no hope, and certainly no assurance, that operation of the property will be any more productive, or that anything will ever be paid bondholders. Certainly nothing will ever be paid stockholders.

The usual annual audit by Schwartz & Holtz has not been made, since the corporation has no funds to pay for such audit. I have asked our treasurer, Mr. Sanford Becker, who is also a certified public accountant, to prepare a report which may be submitted at the meeting, but which probably will not be ready then.

Respectfully submitted, Richard Kelly, President.

[fols. 218-219] IN THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT

In the Matter of CALTON CRESCENT, INC., Debtor

MANUFACTURERS TRUST COMPANY, as Trustee under an Indenture made by the Debtor under date of September 27, 1933, and individually, Objector-Appellant,

against

REGINE BECKER, EMILY K. BECKER and WALTER A. FРИBOURG,  
Claimants-Appellees

**Appendix to Appellant's Reply Brief**—Filed January 6, 1949

[fol. 220] IN UNITED STATES DISTRICT COURT

**Extracts from Stenographic Minutes of the Hearing Before  
Referee Olney**

COLLOQUY

Page 12\*

The Referee (Continuing): He is going to proceed now, I take it, to offer proof of all the allegations in the 16th paragraph of the objection which has been denied; and he doesn't have to go awfully far with his proof, apparently, under Pepper *vs.* Lytton before the burden is cast on the claimant.

**EXTRACTS FROM TESTIMONY OF SANFORD BECKER**

Pages 188-192

By Mr. Hanlon:

Q. Mr. Becker, do you recollect at the first session being asked the following questions and making the following responses—and I am reading from pages 20 and 21 of the minutes—(interrupted by)

Mr. Kahn: Will you hold that a minute while I get my copy, Mr. Hanlon?

\* Page references are to the paging of the stenographer's minutes.

Mr. Hanlon: At the bottom of page 20 and the top of page 21.

Q. (Reading):

"Q. What is the nature of Mr. Fribourg's business?  
A. He is retired.

[fol. 221] "Q. What is the use to which he puts this office desk or space he has? A. I don't know. I have no connection with that.

"Q. You know nothing whatsoever about his affairs then?  
A. No.

"Q. Were you ever connected with Mr. Fribourg's business in any way? A. Never.

"Q. No association with him in any single venture? A. Never."

You heard Mr. Fribourg testifying the other day about these Winsor apartments in Brooklyn, did you not?

A. Yes.

Q. Located I believe at 3111 Glenwood Road in Brooklyn, New York?

A. Yes.

Q. Did you have any connection with any corporation which owned or operated that building?

A. What do you mean by "connection"?

Q. Just what I said: any connection whatsoever?

A. I had no financial interest in it whatsoever.

Mr. Hanlon: I did not ask you about any financial interest. I ask that the answer be stricken, your Honor.

The Referee: Strike it.

Q. Answer the question, please, Mr. Becker.

A. I had no connection, except to do professional work for it.

Q. That is your answer?

A. Yes.

Q. Now, that property at one time was owned by a concern known as Thirty-One-Eleven Corporation, was it not?

A. I don't know.

Q. You don't?

A. It may have.

[fol. 222] Q. Do you know whether it is now owned by a corporation known as Winsor Buildings, Inc.?

A. I don't know.

Q. Do you know anything at all about Winsor Buildings, Inc.?

A. Not very much except the work that I do for it.

Mr. Hanlon: Your Honor, I offer in evidence at this point a certified copy, certified by the County Clerk of Kings County, of a certificate of change of name from Thirty-One-Eleven Corporation to Winsor Buildings, Inc.

Mr. Kahn: I object to this, your Honor.

Mr. Hanlon: The purpose of that, your Honor, is to show that Mr. Sanford Becker who has denied all connections with these ventures, except just as accountant and had nothing to do with it, signed that certified copy as secretary of the corporation and Mr. Fribourg signed as president of the corporation.

Mr. Kahn: Your Honor, this gentleman called Mr. Becker as his own witness.

(Further oral argument followed.)

The Referee: Overruled.

Mr. Kahn: I have my objection on the record.

(Document is received in evidence and marked, "Objectant's Exhibit 17" of this date.)

Q. There is no dispute, is there, Mr. Becker, that you are the Sanford Becker who signed the original of which this is a photostat?

A. No.

The Referee: What is the answer?

Mr. Hanlon: He says "No."

[fol. 223] Q. Do you know, Mr. Becker, where Winsor Buildings, Inc. keeps its bank account?

A. No.

Q. Or any bank account?

A. I wouldn't know.

Q. Do you ever remember signing a signature card for any bank account?

A. Yes, I signed many signature cards.

Q. (Continuing:) For Winsor Buildings, Inc.?

A. I may have.

Q. I show you what purports to be a signature card for the Manufacturers Trust Company and I ask you if that is not your signature opposite the typewritten one, "Sanford Becker, Secretary"?

A. It most assuredly is.

Q. Do you recognize also the other two signatures on there?

A. Yes, of course.

Q. Whose are they?

A. My brother's and Walter A. Fribourg.

Q. And whose handwriting is that at the bottom, the words being "any one officer"?

A. Evidently Fribourg's.

Mr. Hanlon: I offer that in evidence, your Honor.

Mr. Kahn: I make the same objection.

Mr. Hanlon: I ask, however, that the photostat be marked instead of the original. The original will have to be returned to the bank for its records.

Mr. Kahn: Just a minute, give me an opportunity to examine it.

The Referee: All right, mark them both and give the original back to the bank.

(Original and photostat are both received in evidence and marked, "Objectant's Exhibit 18" of this date.)

[fol. 224] Pages 195-196

By Mr. Hanlon:

Q. Now, is there a telephone in your office at 11 West 42nd Street with the number Pennsylvania 6-0569?

A. Yes.

Q. That is in your same suite of offices?

A. That is Mr. Fribourg's 'phone.

Q. Mr. Fribourg is in your suite?

A. That is correct.

Q. And he has the telephone number Pennsylvania 6-0569?

A. That is correct.

Q. And that is the telephone number of the Winsor Buildings, Inc.?

A. I don't know.

Q. I show you the same telephone directory that I showed you before and ask you—

A. It is so listed there.

Q. That is correct?

A. I don't know whether it is their telephone or not. I know Fribourg ordered the telephone and paid for it; it is on his desk.

Q. I am only asking you is that a correct listing: Pennsylvania 6-0659?

A. I don't know whether it is the same or not.

Q. And you don't, despite the fact, Mr. Becker, that Winsor Buildings, Incorporated has its office in the same suite occupied by you, your brother and Fribourg?

Mr. Kahn: Just a minute, Mr. Hanlon. No one disputes the fact that Winsor has a telephone in that office.

[fol. 225] Page 201

By Mr. Hanlon:

Q. Weren't you at one time, until about 1935, vice-president and treasurer of Julius Grossman Shoes Corporation?

A. Vice-president?

Q. Or treasurer of Julius Grossman Corporation?

A. No.

Q. Weren't you an officer of that corporation?

A. No.

Q. You were accountant of the corporation, weren't you?

A. At one time I was.

Q. During what period?

A. I don't remember. Quite some years ago.

Q. Mr. Fribourg was connected with the company at the time you were, was he not?

A. Yes.

Q. You knew Mr. Fribourg at the time he was connected with that company?

A. I knew Julius Grossman about thirty years.

Q. You knew Mr. Fribourg and Julius Grossman?

A. Yes, of course.

Q. And in connection with your accounting work you had contact with him, did you not?

A. Some, yes.

[fol. 226]

## OBJECTOR'S EXHIBIT

## (Extract from Debenture Indenture)

3:06. The Board of Directors of the Company shall on or before February 15th, 1935, and thereafter annually on or before each February 15th until and including the February 15th next succeeding the date of maturity of the Debentures, file with the Trustee a summarized statement in form satisfactory to the Trustee prepared and signed by a certified public accountant satisfactory to the Trustee showing the amount of the Applicable Income for the preceding calendar year ended December 31st and the basis or method of ascertaining same. Whenever any Debentures are entitled to interest on only a portion of the preceding calendar year, as in this Indenture provided, such statement shall also contain a computation of the interest declarable on such Debentures for that portion of the year for which they are entitled to have interest computed. A duplicate of such statement shall be kept at the office of the Company and shall be open to inspection and copying at any reasonable time during business hours by any debenture holder, or his duly authorized representative. Simultaneously with the filing of such accountants' statement the Company shall also file with the Trustee a statement signed by the Treasurer or an Assistant Treasurer of the Company setting forth the amount of interest, if any, declared and paid on the Debentures for said next preceding fiscal year out of the Applicable Income of the Company, if any, as shown by such accountants' statement. The Company will also, upon the request of the Trustee from time to time, furnish the Trustee with such additional evidence of the payment of interest on the Debentures as the Trustee may reasonably require.

[fol. 227] IN UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT—OCTOBER TERM, 1948

No. 111

(Argued January 3, 1949

Decided March 3, 1949.)

Docket No. 21112

In the Matter of CALTON CRESCENT, INC., Debtor

MANUFACTURERS TRUST COMPANY, as Trustee under an Inden-  
ture made by the Debtor under date of September 27,  
1933, and individually, Objector-Appellant,

vs.

REGINE BECKER, EMILY K. BECKER and WALTER A. FIBOURG,  
Claimants-Appellees

Before L. HAND, SWAN and CHASE, Circuit Judges:

Appeal from the United States District Court for the South-  
ern District of New York

[fol. 228] In an arrangement proceeding under Chapter XI of the Bankruptcy Act by Calton Crescent, Inc., debtor, Manufacturers Trust Company, as indenture trustee and individually, filed objections to the claims of three creditors. From an order of the district court, 80 F. Supp. 822, confirming an order of the referee which dismissed the objections and allowed the claims in full, the objector has appealed. Affirmed.

Beekman & Bogue, Attorneys for appellant; Edward K. Hanlon and Bertrand L. Kohlmann, of counsel.

David W. Kahn, Attorney for appellees.

Roger S. Foster, General Counsel, George Zolotar and David Ferber, Special Counsel, for Securities and Exchange Commission as Amicus Curiae; W. Victor Rodin and Ezra Weiss, of counsel.

## OPINION

SWAN, Circuit Judge:

This appeal brings up for review an order with respect to the claims of three creditors, the appellees, in an arrangement proceeding under Chapter XI of the Bankruptcy Act, 11 U. S. C. A. §701 *et seq.* The debtor, Calton Crescent, Inc., was formerly the owner of an apartment house located in New Rochelle, New York. In January, 1946, it sold the apartment house, which was its only property, and in May 1946 filed its petition for arrangement. Thereafter the purchase price received for the property was converted into cash, and the debtor is now able to pay a dividend in its arrangement proceeding of 43.61% to the holders of [fol. 229] its debenture bonds. The appellees, being the holders of certain of such bonds, filed claims based thereon for the face amount thereof. The appellant, Manufacturers Trust Company as trustee under the indenture pursuant to which the debenture bonds were issued and in its individual capacity as a creditor,<sup>1</sup> filed objections to the appellees' claims on the ground that the circumstances under which their bonds were acquired make it equitable to subordinate their claims to those of the other debenture holders so as to limit the dividends payable to the appellees to what the bonds actually cost them. The referee in bankruptcy dismissed the objections and allowed the appellees claims at their face amount. This order was confirmed by the district court, 80 F. Supp. 822, and the objector has appealed. The legal questions presented are, first, whether the issue as to subordination is to be determined by state law or federal law and, second, whether, under the law found applicable, the appellees' dividends should be limited as the objector contends.

As to the first question the appellant is right—federal law controls the distribution to creditors in bankruptcy. The Supreme Court has declared the rule very definitely. In *Prudence Realization Corp. v. Geist*, 316 U. S. 89, the court said at page 95:

“ \* \* \* The court of bankruptcy is a court of equity to which the judicial administration of the bankrupt's

<sup>1</sup> Its claim as a creditor in the sum of \$1,587.50 represents fees and disbursements due it as indenture trustee.

estate is committed, *Securities & Exchange Commission v. U. S. Realty Co.*, 310 U. S. 434, 455-457, and it is for that court—not without appropriate regard for rights acquired under rules of state law—to define and apply federal law in determining the extent to which [fol. 230] the inequitable conduct of a claimant in acquiring or asserting his claim in bankruptcy requires its subordination to other claims which, in other respects, are of the same class.'

Later cases have reiterated the rule. *American Surety Co. v. Sampsell*, 327 U. S. 269, 272; *Heiser v. Woodruff*, 327 U. S. 726, 732; *Vanston Committee v. Green*, 329 U. S. 156, 161-163. For earlier cases on the general subject, see *Pepper v. Litton*, 308 U. S. 295, 303-4; *American Ins. Co. v. Avon Park*, 311 U. S. 138, 146. From these decisions we understand the rule to be that, although the state law determines the title, validity and amount of a claim, the bankruptcy law, including what federal judges think to be equitable, determines what dividends shall be distributable to the claimant. In other words, in addition to those modifications which the Bankruptcy Act itself has imposed upon distribution with respect to preferences, priorities and the like, the courts must impose any other modifications which they deem necessary in the interest of justice.

In the case at bar validity and amount of the bonds held by the appellees are not in dispute; nor is the legal title. The appellant does contend, however, that it is inequitable to allow them to recover full dividends. The amount of their respective claims and the cost thereof are as follows:

<i>Claimant</i>	<i>Face am't of bonds</i>	<i>Cost</i>
Regine Becker	\$44,500	\$3,060.63
Emily K. Becker	52,800	5,010.00
Walter A. Fribourg <sup>2</sup>	50,000	2,124.80

[fol. 231] The aggregate dividend payable upon the three claims amounts to \$64,237.53, while the aggregate cost of

<sup>2</sup> Fribourg's claim as filed was for \$55,000. Objection was withdrawn as to \$5,000 of bonds acquired by him under circumstances which the objector concedes entitle him to the full dividend thereon.

their bonds to the claimants was only \$10,195.43. The difference, namely, \$54,042.10, the appellant contends, must be distributed under equitable bankruptcy principles to the other holders of debenture bonds. These holders whose bonds aggregate \$107,150 (including the \$5,000 of bonds mentioned in note 2, *supra*) will therefore receive approximately 94% of the face value of their claims. Before passing to a consideration of the equitable principles which are said to require this rather extraordinary result, a statement of the facts should be made.

The debtor was organized in 1933 to take title to the New Rochelle apartment house pursuant to a plan of reorganization necessitated by the foreclosure of a mortgage executed in 1927. Under this plan a new first mortgage of \$175,000 was placed on the property and the debtor issued its debenture bonds, in the authorized principal amount of \$256,800, which were to mature in 1953 and to bear interest, not exceeding 6% per annum, if declared by the directors out of net earnings for each calendar year. These bonds, together with the debtor's capital stock, were issued to the holders of participation certificates in the old 1927 mortgage, one share of stock and \$50 of debenture bonds being exchanged for each \$100 of participation certificates. The total amount of debentures issued was \$254,450, debentures of the face amount of \$2,350 being retained for certificate holders who had not deposited their certificates. No interest has ever been paid on the debenture bonds.

Early in 1942 the debtor submitted to its shareholders an offer from a prospective purchaser to pay \$220,000 for the apartment house, but the proposed sale did not obtain the requisite approval by the stockholders. Had the sale been approved the debenture bondholders would have received about five cents on the dollar on the face amount of their bonds. One who opposed the sale was Sanford Becker, the holder of 50 shares of stock and \$5,000 face amount of debentures. Being in default under its first mortgage the debtor was in a precarious condition. Sanford Becker offered to find a client who would lend the debtor \$15,000 upon a second mortgage on condition that he and his Brother Norman Becker be given places on the debtor's five man board of directors and be allowed to select the real estate agent to manage the property; the debtor imposed the further condition that all shareholders and

debenture holders be given an opportunity to participate in the proposed second mortgage. In April 1942 this offer was accepted by the debtor, but none of its shareholders or debenture holders except Fribourg, availed themselves of the opportunity to participate in the second mortgage. The Becker brothers were then elected directors; Sanford became treasurer and Norman secretary, and Mr. Kelly continued as president. Sanford Becker's clients who lent the money secured by the second mortgage were his mother, Regine Becker, his wife, Emily K. Becker and his friend, Walter A. Fribourg. They each advanced \$5,000.<sup>3</sup> Neither of the Becker ladies was a shareholder or debenture holder at this time; Fribourg had shortly before acquired 50 shares of stock and \$5,000 of debentures.<sup>4</sup> On three occasions thereafter, when the debtor again came into default under its first mortgage, the appellees advanced further sums, aggregating about \$8,000, to enable such defaults to be cured.<sup>5</sup> These further advances were repaid without interest during 1945. The second mortgage was always in [fol. 233] default from the end of 1942 but the appellees never threatened to foreclose it and, after the debtor's property was sold in January 1946, it was paid in full with interest. In October 1943 when both the first and second mortgages were in default the appellees obtained an assignment of rents;<sup>6</sup> the property, however, continued to be operated, as before, by the same managing agent. In the summer of 1944, the three directors other than the Becker brothers, sold their stock and debentures and resigned as officers and directors of the debtor. Their places as directors were filled by nominees of the Becker brothers, and Norman Becker became president in place of Mr. Richard Kelly.

<sup>3</sup> The second mortgage was taken in the name of Baset Realty Corporation but it was a mere title holder for the appellees.

<sup>4</sup> These are the debentures mentioned in note 2 *supra*.

<sup>5</sup> To pay overdue taxes \$3615.54 was advanced in September 1943, \$2305.09 in April 1944, and \$2001 in October 1944.

<sup>6</sup> This, like the second mortgage, was taken in the name of the Baset Realty Corporation.

There is no contention that the conduct of the appellees above recounted was "inequitable." It was obviously very beneficial to those debenture holders who retained and have proved their bonds in the arrangement proceeding. It forestalled foreclosure by the first mortgagee, and enabled the debtor to retain its property until it could be sold for a price of \$300,000, which is enough to enable all debenture holders to receive a dividend of 43.61% on the face amount of their bonds. No complaint is made as to the price at which the debtor sold, nor is it suggested that the debtor should have sold sooner at a lesser price or have postponed the sale in the hope of obtaining a better price.

The "inequity" which is said to require that the dividend distributed to the appellees be less than that payable to the other bondholders arises out of the time when, and manner in which, the appellees acquired their bonds. At all times when the bonds were purchased by or for them the debtor was insolvent in the bankruptcy sense.<sup>7</sup> During the period [fol. 234] between April 1942 when the Becker brothers became directors, and the date when the debtor filed its petition for arrangement, May 23, 1946, the appellees acquired the bonds upon which their claims are based.<sup>8</sup> Their own money was used in buying these bonds and neither of the Becker directors had any financial interest in the debentures bought by the appellees. Regine Becker bought her \$44,500 of debentures between February 2, 1944 and August 30, 1945 inclusive, from E. Henry Sondheimer Company, a broker who dealt in over-the-counter securities. Sondheimer had originally acquired them for Fribourg but as the latter did not want them they were bought by the Becker ladies. Emily K. Becker bought her \$52,800 of debentures between May 24, 1944 and February 5, 1945 inclusive; \$7,750 were bought from the Sondheimer Company in the same manner as were Regine Becker's; \$37,500 from the King estate which was represented by Reynolds, Richards & McCutcheon, one of whose partners was a director

<sup>7</sup> Finding 55. Insolvency probably existed throughout the entire period of the debtor's ownership of the apartment house property, but the referee made no finding as to insolvency during earlier years.

<sup>8</sup> Except for one \$500 bond purchased by Fribourg at a cost of \$131.05 on June 4, 1946.

of the debtor; and \$7,550 from the Y. W. C. A. through one Clay, a member of the Association's investment committee and also a director of the debtor, who was kept fully informed of the debtor's financial condition. Fribourg's \$50,000 of debentures were acquired between July 31, 1942 and June 4, 1946, inclusive. Many of Fribourg's debentures were bought from the Sondheimer company or other brokers. \$8,250 were required from Mr. Kelly when he resigned as president and a director in 1944. He insisted that the offer made to him by Fribourg in the name of the latter's brother-in-law, one Charles G. Winter, be extended to all the debenture holders, and Kelly notified all stockholders of the offer and of his intention to accept it. Some of Fribourg's holdings were acquired as a result of that [fol. 235] offer. Another \$8,500 were purchased from Mr. Hays, vice-president of the debtor. The Becker ladies in investing their money in the debentures exercised no independent judgment; their bonds were bought for them by Sanford or Norman Becker. The former was optimistic about the future of the debtor and thought that the termination of the war would be followed by an enhancement of the value of its property. Norman Becker was pessimistic and discussed his point of view with his mother and Fribourg. Fribourg testified that he invested in the debentures as a "gamble" on his own judgment. He apparently obtained some information from the Becker brothers, in whose office he had desk room, since he furnished Sondheimer with a list of the debenture holders which Sondheimer used in sending them inquiries as to whether they would sell. During the period when the appellees were purchasing their debentures the debtor was receiving frequent inquiries from brokers as to terms on which its property might be bought, but no "firm" offer to buy was submitted after the offer rejected by the shareholders in 1942 until receipt of the \$300,000 offer which the debtor accepted in January 1946. The referee concluded that the proofs of debt filed by the Becker ladies should be treated as if they were proofs of debt filed by directors, but that Fribourg's proof of debt should not be so treated. The district court concluded that his claim also should be treated as filed by a director.

One contention of the appellant is that the appellees are disqualified from profiting by their transactions in the

debtor's securities because they acquired them by using information obtained from the Becker directors without adequate disclosure to the sellers. The non-disclosure is said to consist in failure to inform the sellers of (1) the inquiries of brokers as to the terms on which the property [fol. 236] might be purchased; (2) the fact that the appellees were the owners of the second mortgage taken in the name of Baset Realty Corporation; and (3) the fact that they were purchasing debentures. The referee stated that a finding that overreaching or concealment was practiced in the purchase of the securities was not warranted,\* and the district court said that the record did not show this finding clearly erroneous. The appellant wishes us to overrule this finding, but we agree with the district judge that it is not shown to be clearly wrong.

Furthermore, it should be observed that no seller is complaining that he was overreached in parting with his securities, as was the case in *Strong v. Repide*, 213 U. S. 419, upon which appellant puts great reliance. Such sellers as the King Estate, Kelly, Hays and the Y. W. C. A. had as full information as to the debtor's financial condition and the prospect that its property might increase in value after the end of the war as did the appellees. As to securities purchased from over-the-counter traders, such as the Sondheimer Company and other brokers we should hesitate to lay down the rule that the purchaser from a broker must

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\* This was finding 54. There is also finding 30:

"There is no evidence to support a finding that Fribourg in connection with his purchases was acting on any information of an inside nature imparted to him by any officer or director of debtor—something not known to and of which the stockholders were not informed."

And finding 40:

"The record does not warrant a finding of offers to purchase the debtor's said property for sums increasing in amount from the Spring of 1942."

And finding 43:

"From the time that the Chesterbrook Estate offer was turned down until the time of the sale in 1946, nothing which would be called an actual firm offer was made for debtor's property."

make disclosure of why he thinks the purchase a desirable [fol. 237] investment under penalty of being charged with overreaching if he fails to do so.

The appellant's other line of attack rests on two premises, (1) that because of the appellees' relationship to the Becker directors they can stand no better than the Becker brothers themselves would stand if they had invested their own money in the purchase of the securities, and (2) that under equitable principles it is a breach of fiduciary duty for a director to buy the company's securities during its insolvency, and consequently he cannot be allowed to make a profit from such purchases.

For the moment we pass the first premise and direct attention to the second. It is, of course, axiomatic that a fiduciary will not be permitted to profit at the expense of his cestui from any transaction where his fiduciary duty and his personal interest may come into conflict.<sup>10</sup> This principle, however, does not preclude a director from purchasing a claim at a discount and collecting its face amount, if his company is solvent, since who holds the debt can be of no concern to a solvent company. It is not immediately apparent why insolvency should make a difference. It will cost the debtor no more whether the dividend which it may be able to pay creditors goes to the original holder of the debt or to a director-assignee. Counsel for the Securities and Exchange Commission suggests that insolvency creates a possible conflict between duty and personal interest because the directors can choose the time for filing a bankruptcy petition and may accelerate or postpone it if doing so can result in a personal profit. The argument as to the timing of bankruptcy has no force after the petition has been filed, yet the law is better settled with respect to purchases made after the petition is filed than those made before.<sup>11</sup> After insolvency it may be said that the

<sup>10</sup> *Magruder v. Drury*, 235 U. S. 106, 119 is often cited for this well-known principle.

<sup>11</sup> In most of the cases cited by appellant the purchases were made after some type of bankruptcy proceeding was pending or was imminent and known to be so by the director. *Monroe v. Scofield*, 10 Cir., 125 F. 2d 725, 726; *In re Philadelphia & Western Ry. Co.*, 64 F. Supp. 738, 739, (E. D. Pa.); *In re Los Angeles Lumber Products Co.*, 46 F. Supp. 77, 82 (S. D. Calif.).

directors are fiduciaries for the group of creditors who will share in the insolvent's estate. But the creditors who have retained their claims will suffer nothing whether or not the director is allowed to make a profit from his purchases. If a wrong has been done to any of the group of cestuis, it is to those who sold their claims at a price less than the dividend they would have received had they retained them. If they were suing for the wrong done them, they would have to show something equivalent to a fraudulent non-disclosure. *Strong v. Repide*, 213 U. S. 419. Plainly if the contest for the director's profits was between the wronged cestuis and the unwronged cestuis, the former should prevail. Where it is between the unwronged cestuis and a director, if the former are allowed to prevail it can only be as a disciplinary measure against the director for wronging someone who has not complained of the wrong. That this is the real basis for the rule was recognized by Judge Kirkpatrick in the case of *In re Real Estate Mortgage Guaranty Co.*, 55 F. Supp. 749, 752 (E. D. Pa.) where he said:

\*\*\* The doctrine that a receiver may not retain a personal profit made out of his trust is a prophylactic rule. It implements the law's precept that a trustee must give undivided loyalty to his trust. The surcharge is the sanction. \*\*\* In the present case a substantial majority of the ultimate and only beneficiaries of the trust knew of and consented to the receiver's earning [fol. 239] these commissions by placing the insurance through his own agency. I think that is a controlling factor and that it gives the court full discretion to deny the surcharge."

The same judge made a similar statement in *In re Philadelphia & Western Ry. Co.*, 64 F. Supp. 738, 741: "This limitation is not imposed upon the theory that such profits belong to the corporation by reason of any property right that it may have in them but is an administrative sanction for the enforcement of the rules of fiduciary conduct set by the law." If the doctrine be recognized as a disciplinary sanction within the discretion of the court to impose or withhold, then, as Judge Kirkpatrick also said in the *Mortgage Guaranty Co.* case, "Each case depends on its own circumstances." In the case at bar, where there was no overreaching of the sellers, we are not convinced that the circumstances are such as to require imposition of the

sanction, even if the proof of debt had been filed by a director of the debtor.

But if we are wrong as to this, and the federal rule, in the case of a director who buys the company's securities after it has become insolvent, is as strict as the appellant contends and requires that he be disciplined by giving his profit to creditors whom he has not wronged, the rule must be extended even further if the appellees are to be limited to the cost of their debentures. We now come to consideration of the premise that the appellees can stand no better than would the Becker directors were they the claimants. This is a question of law upon which the conclusions of the referee and district judge are not controlling on appeal.

The appellees were not directors or officers of the debtor; their own funds were invested, and no officer or director of the debtor has any interest in the debentures they purchased. In the case of *In re Philadelphia & Western Ry. Co.*, 64 F. Supp. 738, 741 (E. D. Pa.) the court declined to limit the claim of J. Prescott Stoughton who was the father of an officer of the debtor corporation. In so ruling he stressed the fact that the father was not a fiduciary who owed a duty to the debtor, that the purchases were made by the father with his own funds and for his sole account, and that neither the son nor any other person associated with the debtor had any interest in his dealings in the bonds of the debtor. For similar reasons he declined to limit the claim of Agnes C. McKernan who was an officer of the Conway Corporation which had a management contract with the debtor for the management of the debtor's business. These two claims present a closer analogy to the purchases at bar than do any of the other cases brought to our attention. It is true that one who "knowingly confederates" with a fiduciary in a breach of trust is not allowed to make a profit from the transaction. *Jackson v. Smith*, 254 U. S. 586, 589. But "knowingly confederating" means more, in our opinion, than investing one's own funds on a "tip" received from an officer or director of a debtor. With respect to Fribourg we see nothing in the record to justify a finding that he did more than this. As respects the Becker ladies, since they exercised no independent judgment in the investment of their funds, they are chargeable with the knowledge of their agent, Sanford Becker. But since there was no overreach-

ing of the sellers when he made the purchases for his wife and mother, we do not think the disciplinary sanction for "knowingly confederating" with a disloyal fiduciary should be imposed.

Viewing the situation broadly it appears that the second mortgage loan and the subsequent advances made by the appellees staved off foreclosure and made possible the [fol. 241] 43.61% dividend now available for all debenture holders. Although the debtor had long been insolvent in the bankruptcy sense, it does not appear that bankruptcy proceedings were at any time contemplated before the filing of the arrangement petition in May 1946. Prior to that time the appellees acquired debentures from owners who were willing to sell and were not overreached. These circumstances do not seem to a majority of the court to afford adequate reason to limit the appellees' dividends to the cost of the bonds and to transfer the balance as a windfall to the other debenture holders. Accordingly the order allowing their claims in full is affirmed.

#### DISSENTING OPINION

L. HAND, Circuit Judge (dissenting):

I agree with my brothers that the decisive question is not one of New York law, but—so far as I can understand—what federal judges think a "fair" distribution between the bankrupt's creditors would be of the salvage from his estate. I can see an apparent anomaly in distributing the profits on a director's purchase among the creditors at large, when they cannot be returned to the seller. However, it appears to me an excuse for doing so that, if equity regards the bonds as improperly acquired, it is more nearly just to distribute any profits among the other creditors, who have not been paid in full, than to leave them in the director's hands; for they are a part of the bankrupt's assets and the creditors have a better claim to them than the director himself. The fact that the former creditor has not intervened to assert his right to them against the director, is not to be taken as the equivalent of an assignment or release.

Whether any of the bonds here in suit were in fact acquired by means which equity regards as improper is another [fol. 242] matter. I agree that the trustee's case broke down, so far as it rested upon the suppression of any specific

information that the property was going to increase in value; and, if the directors' dividends are to be confined to what they paid for the bonds, it must be because, as directors, they were not free to deal with the creditors at arms' length. The books are full of declarations that an insolvent holds his property in trust for his creditors; and, when the insolvent is a corporation, whose directors were concededly fiduciaries as to shareholders, they become doubly fiduciaries of the creditors upon insolvency. The shareholders have then lost any interest in the assets, and the directors must be fiduciaries of the creditors, if they are to be fiduciaries at all. We can start therefore with the principle universally recognized that, *prima facie*, no fiduciary deals with his beneficiary on terms of equal advantage; and that, if he is to avoid that restriction, he must be able to point to some special circumstance which will excuse him. The claimants in the case at bar argue that, since directors may freely buy shares in the market, they must be equally free to buy debts from creditors after insolvency, when, as I have just said, creditors step into the place of shareholders. That there is at least a prevailing belief in the federal courts to the contrary, the decisions discussed in my brothers' opinion make clear; they form a substantial body of opinion, which *Securities and Exchange Commission v. Chenery* \* did not disturb.

It seems to me that there are solid grounds for distinguishing between such purchases and purchases of shares. I conceive that the law allows a director to increase his take in the company, because it adds to his incentive to make it succeed; the greater the prize, the greater the effort; it will dampen his zeal, if his holdings must be frozen [fol. 243] at what he has when he is elected. Yet he cannot increase them without buying of the shareholders. The common-law was unable to effect any compromise between these opposing considerations, and chose the second; on the other hand, the Securities Exchange Act \*\* succeeded better by forbidding "quick turns" in shares by a director, and circumscribing his freedom no further. When the company is in process of liquidation, I can see no excuse for allowing the purchase of debts, because, although the

\* 318 U. S. 80.

\*\* § 78p (b) Title 15, U.S.C.

director acquires an interest, or an added interest, in the success of the liquidation, he has little or no control over the event, for it is in the hands of the court. Any added incentive which his purchase may contribute is negligible; and the excuse does not exist. Indeed, it is significant that the decisions are clearer against such a purchase than against one made while the company continues as a "going concern." When it does so continue, I doubt if the answer can be put in general terms. The insolvent company may have a good chance of effecting a composition: that is, it may be able to scale down its debts and go on. When that is so, I do not see why the same reasoning which permits a director to buy shares should not allow him to buy up debts. Nevertheless, I should make a distinction between the two situations. Before accepting the excuse in the case of debts, I would put the burden on the director of proving, not only that he genuinely expected by a composition to continue the business, but that his expectation was well founded; and nothing short of both would serve as an excuse. In the case at bar neither was proved, and on this record some at any rate of the purchases appear to me to have been unjustified. Perhaps, if my views had prevailed, it would have been necessary to send the case back for a [fol. 244] trial on the issue I have indicated, but I need not decide that.

It will not be necessary for me to go much into the details. I should not include any bonds bought by a director from a director; surely they stand on an equality. The case is not so plain as to the ladies for whom directors bought bonds. They relied altogether upon the directors' advice and exercised no judgment of their own in deciding to buy. In so doing I think that they became charged with the same equities that would have charged the directors, had they bought on their own behalf. In short, the directors could not pass on to their principals profits which they could not have retained for themselves. The principals were charged with notice of what the agents knew, and therefore the principals were not bona fide purchasers. Finally, it is not important to decide whether Judge Goddard was right in finding that Fribourg's claim should be treated as though it were a director's; or whether the referee was right in deciding otherwise. The correct answer is not altogether clear, and it would be necessary to find it only in case my brothers agreed with my disposition of the chief issue.

[fol. 245] IN UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

Present: Hon. Learned Hand, Chief Judge, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

In the Matter of CALTON CRESCENT, INC., Debtor

MANUFACTURERS TRUST COMPANY, as Trustee, etc., Appellant,

v.

REGINE BECKER, et al., Appellees.

JUDGMENT—Filed March 3, 1949

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 246] [File endorsement omitted.]

[fol. 247] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 248] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 6, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.